Carnegie Endowment for International Peace
DIVISION OF INTERNATIONAL LAW

An International Court of Justice

LETTER AND MEMORANDUM OF JANUARY 12, 1914, TO THE NETHERLAND MINISTER OF FOREIGN AFFAIRS, IN BEHALF OF THE ESTABLISHMENT OF AN INTERNATIONAL COURT OF JUSTICE

BY

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Respectfully inscribed to
the three Secretaries of State of the United States,
ELIHU ROOT, ROBERT BACON, AND PHILANDER CHASE KNOX,
under whose administrations the steps set out in this little volume
were taken to create an International Court of Justice

PREFATORY NOTE

In an address delivered on the first day of February, 1916, at Des Moines, Iowa, President Wilson said:

> You know that there is no international tribunal, my fellow-citizens. I pray God that if this contest have no other result, it will at least have the result of creating an international tribune and producing some sort of joint guarantee of peace on the part of the great nations of the world.

This little volume, published with the permission of the Honorable Robert Lansing, Secretary of State of the United States, because without his permission the official documents which it contains could not properly be made public, is intended to show the progress already made in creating the international tribunal, of which the President of the United States is such an earnest and such a convinced advocate.

In calling attention, as this little volume does, to the coöperation of Germany, France, Great Britain, and the United States in the cause of international justice, the undersigned ventures the hope that these four nations may soon again coöperate as fellow-workers in the cause of international justice, for they must needs coöperate in this cause if justice is one day to regulate the conduct of nations.

JAMES BROWN SCOTT,
Director of the Division of International Law.

WASHINGTON, D. C.,
February 28, 1916.

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PROPOSED COURT OF ARBITRAL JUSTICE

Letter of James Brown Scott to His Excellency, Jonkheer J. Loudon, Minister of Foreign Affairs of the Netherlands, concerning the Establishment of a Court of Arbitral Justice

THE HAGUE, HOLLAND,
January 12, 1914.

MY DEAR MR. LOUDON:

In the course of an interview which you were good enough to give me at The Hague on October 2, 1913, you expressed an interest in a project, which I could do little more than touch upon at the time, for the present establishment of the Court of Arbitral Justice by and for the powers that might be willing to do so and its installation in the Peace Palace before the meeting of the Third Peace Conference. I stated, without going into details, that Holland, as the host of the proposed court, would naturally be a member of it, and I mentioned as possible contracting parties, in addition to Holland, the following countries: Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan and Russia. The proposed Academy of International Law at The Hague, which has this day been agreed to, was the chief topic of our conversation, and I ventured, in connection with it, to suggest the possibility of creating the Court of Arbitral Justice, so that at the formal opening of the Academy, which we hope will take place in August of the present year, you might be able to announce that the eight powers, to which reference has been made, had, upon the initiative of Holland, agreed to constitute the Court of Arbitral Justice, to be installed, like the Academy of International Law, in the Peace Palace. You stated in reply that you thought well of the idea and you intimated your willingness to receive and consider a memorandum on the subject which I offered to prepare. This somewhat formal and forbidding document I now have the honor to hand you, in the hope that it may be of some service to you and that it may advance the cause of judicial settlement of international disputes, as it certainly will, if it should lead you to attempt the establishment of the Court of Arbitral Justice.

The difficulty which has heretofore stood in the way of its composition has been the inability or failure to hit upon a method of

appointing the judges which would be acceptable to all the powers or to any large number of them, a difficulty due to the fact that all nations wish, and not unnaturally so, to be represented in a court which, to be truly international and to bind all nations by its judgments, must be created by all. There was a general agreement at the Second Peace Conference of The Hague in 1907 that the proposed court should be established and be permanently in session at The Hague by its delegation of three judges. Composed, as it would be, of judges appointed for a long period, namely, twelve years, it would have all the advantages of a court of justice and none of the disadvantages of a mixed commission, or of a special and temporary tribunal of arbitration.

The present proposal is more modest and its very modesty frees it from the difficulties involved in the formation of a universal tribunal in which all nations as such are to be represented, and raises the hope that, freed from these difficulties, the smaller and less ambitious court can be created for the powers that may be willing to create it at the present time. But however small the court may be, it should be understood and expressly stated in the convention constituting it that non-contracting powers may use it if they so desire, and that they may appoint judges for the trial and decision of their particular case or cases. A court of this kind, although primarily created by and for a relatively small number of nations would have the advantages and render the services of a truly international court, in which every nation that cares to use it is treated as an equal of every other state.

But it is not the purpose of this letter to outline the plan and to analyze its provisions in detail as this is done in the memorandum. It is rather to explain the *raison d'être* of the memorandum, and to justify its length, for it is, I fear, a somewhat lengthy paper. If it dealt solely with the proposed method of constituting the court, it would be much shorter than it is. It appeared advisable, however, on reflection, to state not merely the proposition, which is comparatively simple, but also the reasons which make the establishment of the Court of Arbitral Justice seem necessary both for the judicial decision of international disputes and for the development of international law. This method of treatment required some consideration of the present so-called Permanent Court of Arbitration, because if this institution is really a court in the strict and technical sense of the word, and if it performs the services of a court of justice, the creation of a new court of like nature seems unnecessary. I have, therefore, but I hope in no unkindly spirit, dwelt at some length upon the defects and shortcomings of the so-called court rather than upon its services, which, however,

I neither overlook nor underestimate, because it is by reason of its defects and shortcomings that the new institution seems necessary. In doing so I have accepted the burden of proof that any one must accept who proposes a change in existing conditions, and in the course of the memorandum I have tried, in a fair and candid spirit, to state and to meet some of the most important objections that may be and indeed have been made to the proposed institution. But in advocating the newer court I have stated my sincere conviction that the present so-called court should be maintained, for it is no less useful, indeed necessary, than the proposed one although its field of activity is different. As Mr. Bourgeois pointed out in his admirable address at the Second Peace Conference, nations may and doubtless will wish to form special tribunals composed of arbiters of their immediate choice for the settlement of perplexing and grave disputes of a political nature; whereas the same nations may be willing to accept, for the decision of justifiable disputes, judges appointed in advance of their controversies, as in differences of the first category negotiation is expected, perhaps required; while in the second category the impartial and passionless application of principles of law and of justice is both expected and required.

In order to establish the Court of Arbitral Justice it is necessary to show that some powers are willing to bring it into being and I have, therefore, stated the agreement of Germany, the United States, France and Great Britain, reached at Paris in March and at The Hague in July, 1910, to constitute the court for a limited number of powers, by means of the composition of the Prize Court. This method of creating the Court of Arbitral Justice presupposed the existence of the Prize Court as it was evidently impossible to use the composition of an existing court that did not exist.

The Netherland Government was informed of these negotiations and I had the very great pleasure of delivering copies of the various agreements to your distinguished predecessor, Mr. van Swinderen.

As the failure of Great Britain to ratify the Declaration of London, upon which the establishment of the Prize Court seems to depend as far as Great Britain is concerned, makes the early constitution of the Prize Court problematical, I have endeavored to show in the memorandum that it is unnecessary longer to wait upon this court as the present proposal to form the Court of Arbitral Justice does not use its method of composition. I have thought it advisable, however, for the sake of completeness, to append the two agreements of March and July, 1910, to the memorandum, and I have also taken the liberty of appending a draft convention calculated to give effect to the present proposal.

In the next place, I have advanced reasons tending to show that the Netherland Government is not only justified in taking the initiative, through diplomatic channels, to constitute the Court of Arbitral Justice as recommended by the Second Conference, but that this Government may properly regard it as its duty to do so. Finally, I have mentioned the reasons which seem to suggest that the present moment is both timely and propitious for such negotiations as, after war and disquieting rumors of possible war, the nations may well turn their thoughts to peace and their efforts to its maintenance; and in the concluding paragraph of the memorandum I have ventured the hope that they might be willing to avail themselves of the opportunity to institute a permanent court of justice and to install it in the Palace of Peace at one and the same time with the Permanent Academy of International Law during the course of the year 1914.

The Administration of President Taft had intended to take action in behalf of the Court of Arbitral Justice and the late Secretary of State, Mr. Philander C. Knox, requested me to undertake a mission to the European powers for this purpose. I gladly accepted the offer with which he honored me and suggested the present method of constituting the court. I drafted a memorandum and an identic circular note for his consideration. These he approved and signed on November 25, 1912, but, for reasons which in no way reflect upon the project and which are immaterial to the present occasion, it was deemed best not to open negotiations at that time with the various powers whose cooperation was necessary for the success of the undertaking. However, I have thought it of more than passing interest to annex the drafts of the memorandum (Appendix No. 1, p. 6) and identic circular note (Appendix No. 2, p. 18) as showing the reasons which influenced the Secretary of State and the project which met with his approval. Whether the present Administration shares these views I am unable to say, as I am not authorized to speak in its behalf It is to be presumed, however, that any and every Administration of the United States will look with favor upon what has generally been considered to be essentially an American ideal.

I am, however, authorized on behalf of Mr. Elihu Root, who as Secretary of State instructed the American delegation to the Second Peace Conference to propose a permanent international Court of Justice, and also on behalf of Mr. Robert Bacon, who as Secretary of State endeavored through diplomatic channels to establish the Court of Arbitral Justice, to say that they heartily approve of the present method to secure its formation, and that they earnestly hope you may

feel justified in taking the initiative and in reaching through diplomatic channels, as recommended by the Second Conference, an agreement (with Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan and Russia) respecting the selection of the judges and the constitution of the court.

If you would not consider it impertinent I would venture to suggest that, if the proposed method of composing the court appeals to your judgment and if you decide to sound the powers specified as to their willingness to coöperate in its establishment, you might perhaps recommend an informal conference, to be held at The Hague, at some time in the near future, of representatives of the powers which approve of its institution, particularly of the delegates of the powers which presented the joint project to the Peace Conference and which negotiated the agreements of March and July, 1910.

It is needless to say that I am at your service in any and every way in which you may think that I can be of use, for the Court of Arbitral Justice and its establishment are to me as life itself.

In the hope that you may see your way to take steps for the formation of the Court of Arbitral Justice in this, or in some better way which may occur to you, and thanking you for the opportunity you have given me of laying my views before you both orally and in writing, I am, my dear Mr. Loudon,

Very sincerely yours,

JAMES BROWN SCOTT.

To His Excellency,
JONKHEER J. LOUDON,
Minister of Foreign Affairs of the Netherlands,
The Hague, Holland.

APPENDIX NO. 1

Draft of a Memorandum approved by Secretary of State Knox, proposing the Establishment of the Court of Arbitral Justice recommended by the Second Hague Peace Conference of 1907

The First Hague Peace Conference, called in the first instance to consider the possible reduction of armaments and the burdens which the existence and increase of such armaments imposed upon the peoples of the different countries, adopted, among other important international agreements, the Convention for the pacific settlement of international disputes, "with a view to obviating, as far as possible, recourse to force in relations between states." The convention dealt with good offices and mediation; created the system of international commissions of inquiry, which bore good fruit in the peaceful settlement of the Dogger Bank incident between Great Britain and Russia; recognized arbitration of legal questions, especially in the interpretation or application of international conventions, "as the most effective and at the same time most equitable means of settling disputes which diplomacy has failed to settle"; devised the list of arbiters from which a temporary tribunal could be formed for the trial and adjustment of an international controversy, and drafted a code of arbitral procedure The Second Peace Conference, which met at The Hague in 1907, revised and enlarged, in the light of experience, the provisions of this important convention, which, however, is still in its conception, as well as in its fundamental provisions, essentially the contribution of the First Conference. For the purposes of the present memorandum, it is only necessary to consider the so-called Permanent Court of Arbitration as created and described in various articles of the original convention of 1899 and in the revised form of 1907. The experience had with international arbitration since its introduction into the modern practice of nations by the Jay treaty of 1794 between Great Britain and the United States, and the frequent and increasing recourse to it, notably, in the settlement of the *Alabama* controversy between Great Britain and the United States by the Geneva award of 1872, and the certainty of continued recourse to it in the future made it eminently fitting and proper that the recourse to arbitration should be facilitated by the

creation of apt machinery and the proceedings before arbitral tribunals systematized.

For this twofold purpose the signatory powers, to quote Article 20 of the convention, "undertake to organize a Permanent Court of Arbitration, accessible at all times, and operating, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present convention." In order to organize the Permanent Court contemplated by this article, each of the signatory powers was entitled to, and actually did select, "four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrators." The persons thus selected constitute the list or panel of the so-called court and are appointed for a term of six years, which may be renewed. From this list of select arbiters, the nations in controversy desiring to avail themselves of the provisions of the convention may form a temporary tribunal for the trial of the case, by choosing the requisite number of judges and, in default of agreement, "each party appoints two arbitrators, and these together choose an umpire." This method, which would permit the temporary tribunal to be composed of four interested persons, was amended by the Second Conference as follows:

> Each party appoints two arbitrators, of whom one only can be its national or chosen from among the persons selected by it as members of the Permanent Court. These arbitrators together choose an umpire.

Under the revised procedure, therefore, there can be but two persons directly interested in the award of the tribunal. Under these circumstances it is evident, as was said at the Second Peace Conference, that "the Permanent Court is not permanent, because it is not composed of permanent judges; it is not accessible, because it has to be constituted for each case; it is not a court, because it is not composed of judges." It is unnecessary to point out to those who have had experience in the creation and operation of the temporary tribunal that it is difficult and time-consuming to constitute; that the expenses incurred in its operation and which fall upon the individual litigants are excessive; and that its awards are not wholly free from the suspicion or taint of compromise. The delay involved in its composition is in itself a deterrent to arbitration, for nations are undoubtedly less inclined to submit a case to arbitration, even when the list is known from which the temporary tribunal can be constituted, than they would be, if "a

Permanent Court of Arbitration, accessible at all times," were in existence, to which the case might be automatically referred upon the request of one or the other of the parties before the countries had taken position and had by their conduct rendered a controversy political, which is in its nature essentially legal.

For these and other reasons which might readily be mentioned, the United States instructed its delegates to the Second Peace Conference to propose "a permanent tribunal composed of judges . . . who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility," and that the judges of the proposed tribunal "should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented."

The first article of the Arbitral Court Convention is the direct result of these instructions, as by it "the contracting powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Court of Arbitral Justice, of free and easy access, composed of judges representing the various juridical systems of the world and capable of insuring continuity of arbitral jurisprudence." The efforts of the American delegation to constitute a truly permanent court composed of trained judges was ably seconded by the delegations of Germany and Great Britain, which joined in the proposal, and by the French delegation, which, although not a joint proposer, was a convinced and resourceful ally.

It will be noted that the proposed court was not to displace the so-called Permanent Court of Arbitration, which was to remain intact and uninjured.

It was stated in the clearest terms by the distinguished first delegate of France, Mr. Léon Bourgeois, in answer to the objection that the proposed court would supersede the existing institution, that there are two classes of controversies which may properly be submitted to arbitration, namely, those in which a political element is present, and those of a purely legal nature; for the first of these classes a temporary tribunal with arbiters of the parties' choice might be preferable, whereas for the second a permanent court composed of judges would be more serviceable. The reasoning of Mr. Bourgeois is so important and conclusive and so relevant to the question at issue that his language on these points should be quoted.

> If (he said) there are at present no judges at The Hague, it is because the Conference of 1899, taking into consideration the whole field open to arbitration, intended to leave to the parties the

duty of choosing their judges, which choice is essential in all cases of peculiar gravity. We should not like to see the court created in 1899 lose its essentially arbitral character, and we intend to preserve this freedom in the choice of judges in all cases where no other rule is provided.

In controversies of a political nature, especially, we think that this will always be the real rule of arbitration and that no nation, large or small, will consent to go before a court of arbitration unless it takes an active part in the appointment of the members composing it.

But is the case the same in questions of a purely legal nature? Can the same uneasiness and distrust appear here? And does not every one realise that a real court composed of real jurists may be considered as the most competent organ for deciding controversies of this character and for rendering decisions on pure questions of law?

In our opinion, therefore, either the old system of 1899 or the new system of a truly permanent court may be preferred, according to the nature of the case. At all events there is no intention whatever of making the new system compulsory. The choice between the tribunal of 1899 and the court of 1907 will be optional, and experience will show the advantages or disadvantages of the two systems.

It may be said without fear of contradiction that the principle of permanency and the advisability in certain cases of judicial decision of international controversies was recognized in the abstract by a large majority of the delegates at the Second Peace Conference. The difficulty arose when it was proposed to compose the court of a restricted number of judges. If it had been agreed to select a comparatively small number of judges from among international jurists of the greatest repute without considering the question of nationality, the Conference could have undoubtedly, although with difficulty and no little embarrassment, made the choice. This principle, however, was not accepted.

Had the proposals of Messrs. Bourgeois and Choate found favor, namely, that, after determining the number of judges to form the court, each nation should propose the name of a judge, and, from the list thus framed, each nation should vote for the number of judges the court was to contain, and those receiving the highest number of votes should be elected, the court would have been constituted. This method, however, was unsatisfactory to the large as well as the small nations, apparently because the large nations feared that they might be out-voted and the small nations that the election might not be wholly free. The large nations wished to be represented permanently in the court and

proposed to the small nations that, while their judges should be elected for the full term, they should only serve in rotation for a varying portion of the time. The small nations refused to recognize the right of the large nations to permanent seats in the court or to accept any method of constituting it which debarred them in fact, if not in theory, from equality of representation. In view of these difficulties and the impossibility of overcoming them in the short time at the disposal of the Conference, the Draft Convention for the establishment of the Court of Arbitral Justice was adopted with the omission therefrom of any provisions either as to the number of the judges or as to the method of appointing them. It recommended, however, to the signatory powers "the adoption of the project . . . of a Convention for the establishment of a Court of Arbitral Justice and putting it in force as soon as an agreement should be reached upon the selection of the judges and the constitution of the court." That is to say, the constitution of the court was remitted to diplomatic channels. The powers chiefly concerned in the introduction of the court and its institution by the Conference intimated, both then and subsequently, their willingness to constitute the tribunal diplomatically. For example, in the official report on the Second Hague Conference, issued by the German Government shortly after the adjournment of the Conference, Germany stated its readiness to coöperate in its establishment in the following measured language:

> The organization of such an arbitral court was proposed at the Conference by the United States of America. The proposal sought, as far as possible, to facilitate arbitration, and for that purpose to create a permanent universal court of justice composed in a definite manner, which should meet each year at The Hague, in order to decide, free of cost, all controversies submitted to it by the contracting powers. Such an organization appeared to be a thoroughly appropriate step, which met also the purposes which Germany sought to attain. The German delegation therefore earnestly supported the proposal, and in coöperation with the American and British delegations, drafted and submitted an adequate proposition to the Conference. The proposal did not, however, lead to the conclusion of a treaty, for the reason that the members of the Conference could not agree upon the manner of composing the Court of Justice. But, in accordance with the first *vœu* contained in the Final Act, the Conference recommended to the powers to accept the draft based upon the proposal referred to, as soon as an agreement could be reached in regard to an appropriate composition of the court. Germany stands ready to coöperate in the establishment of the court.

After a sympathetic account of the proposed court, of the services it would render, and of the proceedings of the Conference in regard to it, and expressing the hope that the court would be shortly established, the French delegation, in its official report, insists upon the duty of the various states to carry to completion the work begun at The Hague. Thus:

> Each of the states must exert special efforts to carry out, as far as possible, the *vœux*, resolutions or recommendations by which the Conference, in matters upon which it could not reach a conclusion, has emphatically signified its desire to see the governments complete its work. It will suffice to refer to the negotiations requisite to give definitive form to the permanent Court of Arbitral Justice, whose operation depends upon an agreement regarding the manner of selecting the judges.

The official report of the British delegation voices its regret that the Arbitral Court was not constituted at The Hague and expresses the hope that it may be instituted. "We can not but hope," it is said, "that the difficulties which we have been unable to overcome may in the end be surmounted, and that our labor as pioneers may in the end not prove entirely fruitless."

Finally, and for the sake of completeness rather than for any doubt as to the attitude of the United States, the following paragraph is quoted from the official report of the American delegation. After briefly explaining the nature and importance of the proposed court and commenting upon its important provisions, the report proceeds:

> It is evident that the foundations of a permanent court have been broadly and firmly laid; that the organization, jurisdiction and procedure have been drafted and recommended in the form of a code which the powers or any number of them may accept and, by agreeing upon the appointment of judges, call into being, a court at once permanent and international. A little time, a little patience, and the great work is accomplished.

It is unnecessary to set forth in detail the various propositions made for this purpose by the United States. In his first annual message to Congress, after the adjournment of the Conference, the President said:

> Substantial progress was also made toward the creation of a permanent judicial tribunal for the determination of international causes. There was very full discussion of the proposal for such a court and a general agreement was finally reached in favor of its creation. The Conference recommended to the signatory pow-

> ers the adoption of a draft upon which it agreed for the organization of the court, leaving to be determined only the method by which the judges would be selected. This remaining unsettled question is plainly one which time and good temper will solve.

Taking advantage of the meeting of the Naval Conference at London (December 4, 1908-February 26, 1909) in order to agree upon unsettled questions of prize law to be applied by the International Court of Prize when it was constituted and in operation, the Secretary of State, under date of February 6, 1909, instructed the American delegates to the Conference, as appears from the identic circular note of October 18, 1909, to propose to this Conference to invest the Prize Court with the jurisdiction of the Court of Arbitral Justice. Thus:

> In order to confer upon the Prize Court the functions of an arbitral court contemplated in the first recommendation of the Final Act of the Second Conference, the Department proposes the following article additional to the draft protocol concerning the Prize Court, next to the last paragraph of your instructions.
>
> And any signatory of the Convention for the establishment of the Prize Court may provide further in the act of ratification thereof that the International Court of Prize shall be competent to accept jurisdiction of and decide any case arising between the signatories of this proposed article submitted to it for arbitration, and the International Prize Court shall thereupon accept jurisdiction and adopt for its consideration and decision of the case the Draft Convention for the establishment of a Court of Arbitral Justice adopted by the Second Hague Conference, the establishment of which was recommended by the powers through diplomatic channels.
>
> Any signatory of the Convention for the establishment of the International Court of Prize may include in its ratification thereof the proposed article and become entitled to the benefits thereof.

The Conference, however, deemed it more advisable to prosecute through diplomatic channels a matter of such magnitude. The Department on March 5, 1909, notified the countries represented at the Naval Conference of its intention to prepare and transmit an identic circular note dealing with this question, and on October 18, 1909, an elaborate identic circular note was prepared and transmitted, in pursuance of such notification, to the powers participating in the Naval Conference. The answers received to the note stated a general willingness to constitute the Court of Arbitral Justice, but intimated a preference for its constitution as a separate and independent tribunal. Three of the joint proposers of the Prize Court at the Second Peace Con-

ference suggested a meeting of duly authorized representatives of the proposers of that convention and, in pursuance of this suggestion, delegates of the four powers met at Paris in March, 1910, and drafted a protocol for the establishment of the Court of Arbitral Justice by means of the system adopted by the Prize Court Convention, conditioned, however, upon the ratification of the original Prize Court Convention and the additional article thereto drafted at Paris in 1910, and conditioned further upon the adherence of eighteen powers to the protocol establishing the Court of Arbitral Justice. It was believed that little or no difficulty would be experienced in securing the acceptance of the additional protocol to the Prize Court Convention, and it has in fact been accepted by all the parties to the original convention. It was hoped, indeed expected, that the convention together with the additional protocol for this important court would be ratified at one and the same time and in the near future by a sufficient number of powers to constitute the court, so that the four powers represented at the Paris conference of 1910 and which had agreed upon a draft convention to put into effect the Court of Arbitral Justice, could within a reasonable time transmit the said draft through the intermediary of the Netherland Government and upon the request of the United States, to the powers represented at the Second Peace Conference. A year and eight months have passed and, although the Senate of the United States has approved the original Prize Court Convention, the additional protocol modifying its procedure, and the Declaration of London, and the President stands ready to deposit the ratifications of these various instruments, the Prize Court has not been agreed to by a sufficient number of states to insure its establishment and the date of depositing ratifications has not been fixed. As is well known, the Government of Great Britain conditioned its acceptance of the Prize Court Convention upon the acceptance of certain principles of law to be applied by the judges of the Prize Court. For this purpose Great Britain invited certain maritime powers to a conference which, as has been said, was held at London in 1908-9, as "it would be difficult, if not impossible, for his Majesty's Government to carry the legislation necessary to give effect to the convention, unless they could assure both Houses of the British Parliament that some more definite understanding had been reached as to the rules by which the new tribunal would be governed." The Declaration of London, as the deliberations of the conference are called, was at the time of its negotiation apparently satisfactory to Great Britain, but the bill embodying the legislation necessary to give effect to the court and to the Declaration has failed of

enactment, and it is impossible for a foreign government to determine whether the unfavorable conditions which prevented the enactment of the necessary legislation still exist, or to form an opinion as to the date when an act to give effect to the Prize Court Convention and to the Declaration of London can reasonably be expected to pass the Parliament, so that Great Britain can be in a position to approve the Prize Court Convention, the additional protocol thereto, and to deposit its ratifications thereof at The Hague.

In view of these uncertainties and in view also of the fact that the United States has, so far as it is able, met the conditions upon which the Draft Convention for the establishment of the Court of Arbitral Justice was to be transmitted to the powers represented at the Second Peace Conference, the Department of State deems it advisable to consult the parties to this agreement, in order to see if it be not possible to proceed with the establishment of the Court of Arbitral Justice, without further waiting upon the ratification of the Prize Court Convention. The Court of Arbitral Justice was subordinated to the institution of the Prize Court in order that its establishment should not be injuriously affected by negotiations for the establishment of the Court of Arbitral Justice. Another reason was that, inasmuch as the four powers agreed to recommend to the nations at large the composition of the Court of Arbitral Justice by the method accepted by Article 15 of the Prize Court Convention, it was highly desirable to postpone the negotiations relating to the Arbitral Court until the Prize Court had been instituted in order to utilize a method of an existing court. As, however, the Prize Court Convention has not been ratified and inasmuch as it can not be confidently or reasonably predicted when the Prize Court Convention will be approved by the number of powers requisite to put it into effect, it would appear that the reason for the delay, however advisable it may have been at the time, has ceased to exist. *Cessante ratione legis cessat et ipsa lex.*

In the judgment of the Secretary of State, these circumstances raise a presumption amounting to a conviction, that the time has come to confer with the Governments of Germany, France and Great Britain, in order to see if steps can not be taken in the immediate future, either to put into effect the Court of Arbitral Justice, as modified by the draft convention adopted at the Paris conference of 1910, as amended by the subsequent conference at The Hague on July 25, 1910, or to consider whether they and the other powers which may be favorable to the institution of the proposed court would be willing to compose the court by a smaller number of judges than that con-

templated by the draft convention of July 25, 1910, with the distinct understanding that the court, when constituted, would be temporary in its nature, in the sense that the establishment of a larger and more general tribunal might be considered at the next Peace Conference, and that no attempt should be made to persuade those powers which may be opposed to its institution to participate in its creation. Supposing that the powers entitled under Article 15 of the Prize Court Convention should desire or be willing to constitute the court, it does not seem reasonable that the powers that do not wish to coöperate in its establishment should prevent the powers really desiring it from calling it into being. Respect for the powers that oppose the establishment of the court by means of Article 15 of the Prize Court Convention can not reasonably mean that the powers desiring to establish the Court of Arbitral Justice by the method of the Prize Court should not be at liberty to negotiate an agreement for this purpose. The only circumstance which it is conceived should militate against the creation of the court by the powers entitled to permanent representation in accordance with the method of the Prize Court, is that its institution would tend to prevent the establishment of a more general court and thus retard the cause of judicial settlement. But it is difficult to see how the creation of the court by a limited number of powers, to be used by them for the judicial determination of international conflicts of a legal nature which may arise between them, would retard the formation of a larger and more general tribunal, especially if it were understood and clearly expressed that the proposed tribunal is established because of the present difficulty in constituting a larger and more general one, and that the powers undertaking its creation state at the time of its institution their willingness to coöperate in the formation of the larger tribunal either through subsequent diplomatic negotiations, or at a future Peace Conference.

It is assuredly inherent in sovereignty that any number of powers may agree to establish a tribunal for themselves unless they have expressly renounced the right to do so, and no renunciation of this kind is known to exist. The Convention for the establishment of a Court of Arbitral Justice adopted at The Hague did not specify any number of powers as necessary to its creation, and the recommendation to the powers adopted by the Conference to establish the court through diplomatic channels makes no mention of the number of powers which might be requisite. In this respect the draft convention differed from that of the Prize Court, which states in Article 52 that " the deposit of the ratifications shall take place . . . if the powers which are ready

to ratify furnish nine judges and nine deputy judges to the court, qualified validly to constitute the court. If not, the deposit shall be postponed until this condition is fulfilled."

That this interpretation is correct is evident from Article 54, which declares that the present convention "shall come into force six months from the deposit of the ratifications contemplated in Article 52." It should further be stated that it was contemplated that sufficient powers might not ratify the convention to furnish the fifteen judges of which it was to consist, as Article 56 provides that "when the total number is less than eleven, seven judges form a quorum." There is, however, another reason for believing that the coöperation of no definite number of powers is necessary to the institution of the Arbitral Court, because the text, as finally adopted, is silent on this question; the number of judges of which it is to consist is not specified, and, as previously stated, the recommendation adopted by the Conference for the constitution of the court through diplomatic channels does not make its institution depend upon the coöperation of any definite number. Its establishment is conditioned solely upon an agreement as to the choice of the judges and the constitution of the court. It would seem to be clear, therefore, that any number of powers can agree upon the choice of judges and the constitution of the court, in so far as they are concerned, and when this is done, the court is established for them without violating either the letter or spirit of the draft convention or recommendation. Its constitution, therefore, would seem to depend upon the willingness of a certain number of powers to constitute it.

The one objection which might be made to the creation of the court by a limited number of powers which, if well founded, would prevent the United States from considering, much less from making the proposal, is the criticism that its establishment under these circumstances and conditions would retard the formation of a larger and more general tribunal. But this objection, even if made, would be more specious than real.

It was commonly said that arbitration is suited for the adjustment of trifling or comparatively unimportant questions, but that larger issues could not be settled by this means. The arbitration of the *Alabama* claims has deprived this objection of much of its supposed weight, and we have seen within the last two years Great Britain and the United States submitting questions of a sovereign nature to the so-called Permanent Court at The Hague. A comparatively short and highly successful series of arbitrations has convinced nations by actual experience that arbitration of important questions is not only possible

but advisable. It is not too much to suppose that the institution of a court of restricted numbers for the judicial determination of controversies of a legal nature which may arise among the contracting parties will furnish an equally instructive object lesson to the nations at large advancing at one and the same time the cause of judicial settlement and the institution of a permanent court, in order that the nations at large might have the benefit of its just and impartial decisions. The beneficent operations of the court, although in the first instance restricted to the parties which have actually instituted it, might be extended by a provision that a controversy between a contracting and a non-contracting state might be, with the consent of the non-contracting party, submitted to the court for determination, and a judge of the non-contracting state might be admitted *ad hoc*. Again, the contracting powers might agree that non-contracting powers might avail themselves of the court for the adjudication of their controversies, and that the membership of the court might be increased by the admission of a judge of each of the parties in litigation for the decision of the case, if this were desired by them. It is believed and confidently asserted that the establishment of the court for a limited number of powers, that is to say, by the powers that may wish it, would advance, not retard, the creation of a more general court, and would at one and the same time advance the cause of judicial settlement, and that the experience acquired by its creation and operation would be useful in any subsequent negotiations for the establishment of a larger Court of Arbitral Justice.

For these reasons the Department of State proposes that the question of the Arbitral Court and its establishment in the immediate future be taken up and considered by the powers which negotiated the draft convention of March, 1910, in the hope that an agreement may be reached without further delay upon this important question, which, in the opinion of the Secretary of State, vitally concerns the maintenance of international peace.

Appendix No. 2

Draft of an Identic Circular Note proposed to and Approved by Secretary of State Knox, to be sent to the American Ambassadors at London, Berlin, and Paris

Sir:

I have the honor to confirm my cable of . . . concerning the establishment of a Court of Arbitral Justice, the contents of which you were directed on . . . to communicate to the Secretary-Minister of Foreign Affairs. The instruction which you have received, and the contents of which you have communicated to the Secretary-Minister of Foreign Affairs in accordance with the instruction of . . . was intended to show the deep and abiding interest which the present Administration takes in the establishment of a Court of Arbitral Justice, the judges of which should be known in advance of prospective litigation and who, from their training and experience, would, in the decision of international controversies, act under a sense of judicial responsibility. This Government is convinced that the apparent reluctance of governments to submit to arbitration their international controversies of a legal as distinct from a political nature is due in large measure to the fear that the controversies in question will not be decided solely by the principles of law, which the governments in dispute believe to be applicable to and determinative of the cases in question, but that a praiseworthy desire on the part of the arbiters to settle the questions without wounding the susceptibilities of the parties in controversy leads naturally and almost inevitably to a compromise of conflicting interests, in which each party obtains a formal recognition of some of its contentions. This view of the question receives support from Article 37 of the Convention for the pacific settlement of international disputes of October 18, 1907, which provides that "international arbitration has for its object the settlement of disputes between states by judges of their own choice and on the basis of respect for law." Elements may well enter into the choice of judges for a particular case, which would be absent if the judges constituting a permanent court were chosen in advance of litigation, and, without impugning the integrity of the judges chosen for a particular occasion, it would seem that the impartiality which is so unnecessary in judicial proceedings would be better safeguarded by an appointment

long in advance of the controversy which they were called upon to decide.

In the next place, it will be noted that the judges contemplated by Article 37 are to settle disputes "on the basis of respect for law." This expression may mean that principles of law are to be applied in the settlement of the controversies, but it does necessarily and unequivocally mean that the decision is to be singly and solely in accordance with and by the application of principles of law, which are really determinative of the question.

The fundamental purpose of the convention is to settle international differences which diplomacy has failed to adjust, and it is frequently stated that arbitration, as understood and practiced, is a continuation of diplomatic procedure. The principle of give and take is as appropriate in diplomatic adjustment as it is inappropriate in proceedings which are claimed to be judicial or on the basis of respect for law.

In pointing out defects in the present method of peaceable settlement of international disputes, my purpose is not to condemn a system which has rendered very great services to nations in controversy and is in itself a legitimate triumph of our modern civilization, but rather to suggest that more perfect machinery for the peaceful settlement of international disputes may be devised, which will be free from these defects, although the proposed machinery may be, as is the case with human invention, subject to legitimate criticism of a different nature. Whether this be so or not experience alone can decide.

This Government believes that arbitration to maintain itself in the practice of nations, must be converted into a judicial remedy, that the temporary tribunal organized for the determination of a particular case shall be replaced by a permanent tribunal for the trial of any and all cases of a legal nature, which may be presented to it, and that principles of law and justice may be as impartially applied in international tribunals as is fortunately the case in the national courts of civilized countries; that the arbiters acting under a sense of diplomatic standards of conduct shall make way for judges acting under a sense of judicial responsibility.

These reasons for the development of arbitration into a judicial system and the establishment of a permanent court for the judicial settlement of international controversies are as applicable to present conditions as they were in the year 1907, when the Second Hague Peace Conference met. They were enumerated in the instructions to the American delegation, from which a passage deserves quotation:

> The method (it is said) in which arbitration can be made more effective, so that nations may be more ready to have recourse to it voluntarily and to enter into treaties by which they bind themselves to submit to it, is indicated by observation of the weakness of the system now apparent. There can be no doubt that the principal objection to arbitration rests not upon the unwillingness of nations to submit their controversies to impartial arbitration, but upon an apprehension that the arbitrations to which they submit may not be impartial. It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honorable obligation, and frequently lead to widely differing results. It very frequently happens that a nation which would be very willing to submit its differences to an impartial judicial determination, is unwilling to subject them to this kind of diplomatic process.

To this statement of the problem, which carries conviction without the need of argument, additions may be made without proceeding beyond the bounds of reasonable criticism. It is to be doubted whether nations would be willing to continue in the long run to submit their controversies of a legal nature to diplomatic adjustment of arbiters, however enlightened and honest, for, if the adjustment is to be diplomatic rather than judicial, it is to be apprehended that they will prefer, and properly so, to intrust the diplomatic negotiation of differences to their diplomatic agents, who act upon instructions from the foreign offices which have been organized to conduct the international relations of the various countries. If negotiation instead of judicial decision is to prevail, nations will no doubt prefer, should direct negotiations fail, to resort to good offices and mediation or, in appropriate cases, to constitute commissions of inquiry, which will not supersede but rather supplement the action of diplomacy. In the next place, a diplomatic adjustment of controversies through arbitration is open to the criticism that the nations can but imperfectly forecast the probable action of arbiters, even although they be of their own choice, and would be inclined to prefer their own agents, upon whose zeal and devotion they have a right to rely, whereas in a judicial proceeding the nations in controversy can form a clear notion in advance of the controversy of the principles of law which they believe to be applicable to the case and upon whose recognition and application the case is

adjudged. They can, therefore, with a reasonable degree of certainty, predict the judgment of the tribunal in advance of its decision, as well as the consequences which will necessarily result from it. It is believed that nations would, therefore, be more willing to submit their differences of a legal nature, if they were assured in advance by the character of the judges composing the court that the judgment, whether favorable or unfavorable to their respective contentions, would be based upon the passionless application of principles of law, with which they, as well as the judges, are familiar.

In another passage of the instructions, the remedy was indicated: "If there could be," it is said, "a tribunal which would pass upon questions between nations with the same impartial and impersonal judgment that the Supreme Court of the United States gives to questions arising between citizens of the different states, or between foreign citizens and the citizens of the United States, there can be no doubt that nations would be much more ready to submit their controversies to its decision than they are now to take the chances of arbitration." Therefore, the American delegation was instructed to propose "a permanent tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility. These judges should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented. The court should be made of such dignity, consideration, and rank that the best and ablest jurist will accept appointment to it, and that the whole world will have absolute confidence in its judgments."

It is a matter of common knowledge that in pursuance of these instructions the American delegation proposed at the Second Hague Conference the creation of a truly permanent tribunal, that the delegations of Germany and Great Britain joined in the proposal, and that, after much deliberation and discussion, the draft convention of Germany, the United States and Great Britain for the creation of a Court of Arbitral Justice was adopted by the Conference. It is unfortunate that, owing to the short time at the disposal of the Conference and the further fact that the delegates were not familiar in advance of its meeting with the intention of any government to propose such a tribunal, an agreement was not reached upon a method of composing the court which was acceptable to the powers generally. It is, however, a consolation to the believers in the judicial settlement of international dis-

putes that not only the principle of such determination, but also a convention for its realization was adopted, with the recommendation that it be put " into effect as soon as an agreement shall have been reached as to the choice of the judges and the constitution of the court."

Since the adjournment of the Conference the advisability and indeed the necessity of the establishment of such a court, in order to make arbitration a judicial and therefore a more effective remedy, have been discussed by writers on international law, who have expressed themselves overwhelmingly in favor of its institution, and by learned bodies in various parts of the world—more especially by the Institute of International Law, which at a recent session, at which publicists from fourteen countries were present, recommended its establishment without a dissenting voice,—and diplomatic negotiations have been undertaken to reach an agreement, to quote the language of The Hague Conference, " as to the choice of the judges and the constitution of the court," in order that it may be put into effect and, by successful operation, justify the hopes of its proposers by the ordinary, impersonal, and passionless determination of legal controversies, which, often trifling and insignificant in their beginnings, assume political importance, embitter diplomatic relations, and jeopardize the maintenance of general peace, which is, as was said by the enlightened Czar of Russia in his call for the First Hague Conference, " the ideal towards which the endeavors of all governments should be directed."

It is not the purpose of the present instruction to dwell upon the benefits which would necessarily result from the creation and successful operation of the Court of Arbitral Justice, as these benefits are universally recognized and admitted and are as familiar to the world at large as a twice-told tale. The purpose of this instruction is to show the continued and sustained interest which the people of the United States have taken in the judicial settlement of international disputes since the first days of the Republic, and the earnest desire of the President and of the Secretary of State to crown their labors in behalf of international peace by the creation of an international tribunal which, if it did not include all the nations of the world, nevertheless may serve as a court to those countries which are willing to coöperate in its institution and share in the benefits of its operation.

In a recent address of the President there appears a passage, which merits the careful and thoughtful attention of the friends of peace and shows not only his personal interest in the establishment of an international court, but calls attention to the measures which his Administration has taken to secure its establishment.

> I am strongly convinced (he said) that the best method of ultimately securing disarmament is the establishment of an international court and the development of a code of international equity which nations will recognize as affording a better method of settling international controversies than war. We must have some method of settling issues between nations, and if we do not have arbitration, we shall have war. Of course the awful results of war with its modern armaments and frightful cost of life and treasure, and its inevitable shaking of dynasties and governments, have made nations more chary of resort to the sword than ever before; and the present, therefore, because of this, would seem to be an excellent time for pressing the substitution of courts for force.
>
> I am glad to come here and to give my voice in favor of the establishment of a permanent international court. I sincerely hope that the negotiations which Secretary Knox has initiated in favor of an International Prize Court—after the establishment of that court—will involve the enlargement of that court into a general arbitral court for international matters. It is quite likely that the provisions for the constitution of the Arbitral Court will have to be different somewhat from those that govern the selection of members of the Prize Court, but I am glad to think that the two movements are in the same direction and are both likely to be successful.

In pursuance of the President's desire so clearly expressed in the above quotation, the Department of State has decided to continue and, if possible, to carry to successful completion the negotiations concerning the establishment of the Permanent Court of Arbitral Justice. While recognizing that certain modifications of the draft convention may be necessary and that but a limited number of powers may be willing to participate in its creation, nevertheless the agreement of even a smaller number of powers than that originally contemplated would create a court for those so participating, and the successful operation of the court thus constituted would justify its creation and would go far to persuade even those who have heretofore doubted its feasibility either to claim its benefits by adhering to the agreement which calls it into being, or would lead to its modification by subsequent negotiations, preferably at a future conference at The Hague, so that all countries which recognize and apply principles of international law in their mutual relations might participate, to quote the President's words, "in the enlargement of that court into a general arbitral court for international matters." For this purpose the Department of State has determined to send a duly accredited representative to discuss the basis upon which such a tribunal could be created and, if possible, to agree

upon a convention for its establishment. The Department has selected James Brown Scott, Esq., technical delegate of the United States to the Second Hague Conference and formerly Solicitor for the Department of State, who is familiar with the proceedings of the Conference at which the court was proposed and who negotiated on behalf of the United States the agreement with representatives of Germany, France and Great Britain for the institution of the Court of Arbitral Justice.

You will communicate a copy of this instruction and the inclosed memorandum to his Majesty's Principal Secretary of State for Foreign Affairs (the Minister of Foreign Affairs), and in so doing you will assure him of the great personal desire of the President and the Secretary of State that the present Administration may, through his coöperation, be enabled to carry to successful completion the negotiations which it began in the first months of its existence and which have occupied so large a part of the thought and attention of both the President and the Secretary of State.

Memorandum of James Brown Scott, accompanying his Letter of January 12, 1914, to the Netherland Minister of Foreign Affairs, proposing the Establishment of a Court of Arbitral Justice by and for Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan, the Netherlands and Russia

Burden of proof upon innovator.

The proposal to establish an international court for the settlement of disputes between nations is far from new, and the arguments advanced for it by the enlightened of all countries that make pretense to civilization are many and varied, and are so well known that they have become, as it were, common property. As, however, it is incumbent upon anybody who proposes a change in existing conditions to justify the change thus assuming, to use a familiar expression, the burden of proof, it may be considered necessary, or at least advisable, to show some of the defects of the so-called Permanent Court of Arbitration and some of the services that a truly permanent international court may reasonably be expected to render even although the undersigned should merely restate opinions generally held by leaders of thought, without contributing anything of his own to advance the great cause of peaceable settlement.

Different kinds of peaceful settlement.

Reasonable people are generally agreed that differences between nations, just as quarrels between individuals, should be settled peaceably, and much progress has been made in the past few years toward peaceable settlement. A public sentiment, however feeble, and inadequate it may be, has been created in favor of such settlement in the different countries which, taken together, make up the society of nations; and many agencies fortunately exist which facilitate and render possible the friendly adjustment of disputes between nations. Ministries of foreign affairs have come into being and exist in every country, and are able, with time and patience, and with much good-will and kindly concession, to settle through diplomatic negotiation differences which in times past would have led to war. Where diplomacy has failed to adjust international controversies, good offices and mediation have succeeded; friendly composition, and arbitration, particularly the latter, have been resorted to, and not in vain, to straighten out the tangled threads of diplomacy; commissions of inquiry have been formed to find facts, and by so doing have either settled the dispute, or have powerfully contributed to its adjustment.

Future of arbitration.

It would be foreign to the present purpose to dwell upon any of these peaceful agencies, which have been tried and not found wanting whenever they have been used in good faith. This memorandum is intended rather to show the services which a new method of peaceful settlement would render to the cause of international peace. The newer method to which reference is made is the judicial settlement of international disputes; and it is a fact that very many people, whose opinions are entitled to the greatest respect, believe not only that the future of arbitration is conditioned upon its becoming a judicial remedy, but also that the effective and satisfactory settlement of international differences of a *justiciable nature* depends upon the creation of an international tribunal, composed of judges acting under a sense of judicial responsibility, which shall do for the world at large what national courts of justice have done for individuals within national lines.

Experience of nations with arbitration.

It is not necessary at the present day to advocate arbitration, although it is, unfortunately, necessary to persuade countries in controversy to resort to it. Since its formal re-entry [1] into the practice of nations, by means of the Jay treaty of 1794, and the unexpected success of the mixed commission organized under Article 7 of that treaty, there have been some 200 or more international differences, often involving many claims, settled by mixed commissions or temporary tribunals, formed for the trial of the case or cases, and passing out of existence with the adjustment of the dispute or disputes. Since the creation of the so-called Permanent Court of Arbitration by the First Hague Peace Conference, there have been a dozen conflicts settled by special tribunals whose members have been selected from the panel of judges likewise devised by the First Peace Conference. These tribunals, like the mixed commissions, pass out of existence with the decision of each particular case. Nations have therefore had, it would seem, plenty of experience in order to determine whether or not the arbitral method of peaceful adjustment is practicable; and it is believed

[1] The great German publicist, Georg Friedrich von Martens, justly regarded as one of the founders of international law, writing in the period of the French Revolution and of the Empire, said of arbitration that "this measure, much used during the whole of the Middle Ages, has not been entirely abandoned up to the present day, but the examples of arbitration offered and accepted have become rare and more rare from an experience of the drawbacks which seem to be inseparable from this method, which is ordinarily insufficient, especially because of the lack of an executive power." *Précis du Droit des Gens,* 3d ed. 1821, p 318

Klüber, likewise a German publicist of distinction, writing somewhat later in the same stormy period, said truly enough that "this method has been neglected for several centuries." *Droit des gens moderne de l'Europe,* 1819, Stuttgart, §318, p. 494.

that a nation would hesitate to maintain that this method which has "won its spurs," to use a military expression, is not practicable. But a method may well be practicable and yet not be adequate; or it may be practicable for one class of cases, and ill-suited for a different class. It was to be expected, and the expected has happened in this instance, that the arbitral awards of the past century would be criticised by citizens or subjects of the losing country. The awards have also been questioned by enlightened publicists, whose countries were not parties to the proceedings. The criticism has been severe, perhaps unjustifiable at times; but it is through criticism that defects are discovered, and it is through criticism that defects are remedied.

Criticism of arbitral awards.

A single example of the criticism of which the books are full may be mentioned, as it comes from a distinguished publicist whose country has appeared but once before the Permanent Court, without, however, selecting an arbiter, and which, as the seat of the Court, has, it is believed, the greatest interest in the success of arbitration.

In an exceedingly interesting and suggestive article on the Future of International Public Law, Mr. de Louter, until recently professor of international law in the University of Utrecht, felt justified in citing the following three arbitral decisions as miscarriages of justice:

> In the first place we may cite the arbitral award of Mr. F. de Martens of February 13, 1897, in the affair of the *Costa Rica Packet* between the Netherlands and Great Britain. In the next place we may mention the decision of the Court of Arbitration of February 24, 1911, in the Anglo-French difference concerning one Savarkar, a Hindoo, who succeeded at Marseilles in escaping from an English vessel upon which he was being transported, and who was immediately apprehended on land by some of the ship's crew with the help of a French policeman. We may permit ourselves the question if political motives do not appear in the decision of September 7, 1910, of the same court, in the controversy between Great Britain and the United States regarding the fisheries in the Atlantic Ocean.
>
> These three examples (the distinguished author continues) taken at random from arbitral awards, suffice to show that even the Permanent Court of Arbitration does not offer sufficient guaranties against the presence of elements absolutely inconsistent with law. . . . After this, can we be astonished that governments, conscious of their responsibility, hesitate to intrust to arbitration, notwithstanding their sympathy and respect for it, the interests, often serious, with which they are charged?[1]

[1] On peut citer d'abord la sentence arbitrale de M. F. de Martens du 13 février 1897 dans l'affaire du *Costa Rica Packet* entre les Pays-Bas et la Grande-Bretagne. On doit indiquer encore l'arrêt du 24 Février 1911 de la Cour d'Arbitrage dans le différend Anglo-française à propos de Savarkar, l'Hindou

But the Dutch jurist is not content to criticise and to explain: he suggests the remedy, which is nothing more nor less than the establishment of the Court of Arbitral Justice. Thus, he says:

> The Conference of 1907 drafted, however, a project dealing with the composition and jurisdiction of the Court of Arbitral Justice, which it recommended the signatory powers to put into effect as soon as an agreement should be reached upon the choice of judges and the constitution of the court. If then the creation of the court did not actually take place, at least there is the possibility of creating it in the future. The real progress which has been made in the recent past justifies this hope. If the institution is established, we shall be able by means of it to correct excess of power and to prevent arbitration from being influenced by political views; in a word, we shall eliminate two capital defects which militate against arbitration.[1]

Arbitration splits the difference.

As a result of the experience had in the practice of arbitration since the negotiation of the Jay treaty in 1794, many partisans of peaceful settlement have come to the conclusion that arbitration is too often synonymous with compromise; that it is "an adjustment" of difficulties rather than "a judicial decision" of controversies; and fear has been expressed in many quarters that if compromise continues to characterize arbitral awards, nations may, instead of resorting to it more frequently in the future than in the past, prefer, and properly so, to compromise their differences directly through diplomatic agents whom they can control, rather than to submit them to arbiters who are not

qui parvint, à Marseille, à s'enfuir du navire anglais qui le transportait et qui fut aussitôt appréhendé à terre par des hommes de l'équipage avec le concours d'un agent de la police française. Il est permis de se demander si des mobiles politiques ne transpercent pas aussi dans l'arrêt du 7 septembre 1910 de la même Cour dans la contestation entre la Grande-Bretagne et les Etats-Unis à propos des pêcheries de l'océan Atlantique

Ces trois exemples, pris au hasard parmi les sentences arbitrales, suffisent à montrer que la Cour permanente d'arbitrage elle-même n'offre pas des garanties suffisantes contre la pénétration d'éléments absolument étrangers au droit . . . Peut-on s'étonner après cela que des gouvernements conscients de leur responsabilité hésitent à confier à l'arbitrage, malgré qu'ils aient pour lui sympathie et respect, des intérêts, réellement graves parfois, dont ils ont la charge? *Revue générale de droit international public*, vol xix, 1912, pp 289-290

[1] La Conférence de 1907 rédigea toutefois un projet sur la composition et la compétence de la Cour de Justice arbitrale, qu'elle recommanda aux puissances signataires pour entrer en vigueur dès qu'un accord serait intervenu sur le choix des juges et la constitution de la Cour. Si donc la création de la Cour n'a pas eu lieu effectivement, du moins la possibilité de la réaliser à l'avenir demeure. Les progrès réels effectués dans un passé récent permettent à ce sujet d'espérer. Si l'institution parvient à s'établir, on préviendra grâce à elle les excès de pouvoir et on empêchera que l'arbitrage ne soit influencé par les vues politiques; en un mot, en écartera deux défauts capitaux qui pèsent sur l'arbitrage *Ibid.*, pp 290-291.

wholly subject to their supervision. To drive compromise from the bench and to exclude it from the court room is not to deny it a right to exist and to flourish elsewhere, for it is often useful, sometimes necessary. It is, in fact, the life and soul of diplomatic negotiation and of diplomatic adjustment, for nations have adopted in their mutual intercourse the principle of "give and take," and are inclined to yield a point in the interest of good understanding; but they naturally wish to determine for themselves what can or can not be yielded, and to conduct by their accredited agents negotiations leading to an agreement. Should they fail to adjust their differences by direct negotiations, it is hard to believe that they will long continue to be willing to intrust persons, not subject to their direction, with the delicate and difficult task of deciding, without consulting them, what concession should be made. In a word, if arbitration is to be considered as a diplomatic process, nations may properly prefer their own diplomacy; if arbitration is to be considered another and a different remedy, especially if it be in fact as well as in theory a judicial remedy, nations may be willing to resort to it when diplomacy has failed to adjust disputes of a legal or justiciable nature.

Arbitration *versus* judicial settlement. Mr. Root's views.

As authority for the views imperfectly expressed in the above paragraph, the undersigned takes the liberty of quoting two passages from Senator Root, who led the American bar as long as he cared to practice before it, and whose Secretaryship of State is the golden period of American diplomacy. In an address delivered in 1907, before the National Arbitration and Peace Congress, Mr. Root said:

> Arbitrators too often act diplomatically rather than judicially; they consider themselves as belonging to diplomacy rather than to jurisprudence; they measure their responsibility and their duty by the traditions, the sentiments and the sense of honorable obligation which have grown up in centuries of diplomatic intercourse, rather than by the traditions, the sentiments and the sense of honorable obligation which characterize the judicial departments of civilized nations. Instead of the sense of responsibility for impartial judgment which weighs upon the judicial officers of every civilized country, and which is enforced by the honor and self-respect of every upright judge, an international arbitration is often regarded as an occasion for diplomatic adjustment. Granting that the diplomats who are engaged in an arbitration have the purest motives; that they act in accordance with the policy they deem to be best for the nations concerned in the controversy; assuming that they thrust aside entirely in their consideration any interests which their own countries may have in the controversy or in securing the favor or averting the displeasure of the parties be-

> fore them; nevertheless it remains that in such an arbitration the litigant nations find that questions of policy and not simple questions of fact and law are submitted to alien determination, and an appreciable part of that sovereignty which it is the function of every nation to exercise for itself in determining its own policy, is transferred to the arbitrators.[1]

In this passage Mr. Root spoke as a citizen interested in arbitration as a means of peaceable settlement. In the following quotation, taken from his instructions to the American delegates to the Second Peace Conference, he spoke as a statesman and in his official character of Secretary of State:

> The method in which arbitration can be made more effective, so that nations may be more ready to have recourse to it voluntarily and to enter into treaties by which they bind themselves to submit to it, is indicated by observation of the weakness of the system now apparent. There can be no doubt that the principal objection to arbitration rests not upon the unwillingness of nations to submit their controversies to impartial arbitration, but upon an apprehension that the arbitrations to which they submit may not be impartial. It has been a very general practice for arbitrators to act, not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods are radically different, proceed upon different standards of honorable obligation, and frequently lead to widely differing results. It very frequently happens that a nation which would be very willing to submit its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process. If there could be a tribunal which would pass upon questions between nations with the same impartial and impersonal judgment that the Supreme Court of the United States gives to questions arising between citizens of the different states, or between foreign citizens and the citizens of the United States, there can be no doubt that nations would be much more ready to submit their controversies to its decision than they are now to take the chances of arbitration.[2]

Legal disputes should not be compromised.

Again, some questions are proper subjects for compromise, whereas others are not. Special interests may be sacrificed, political questions may be discussed and debated, and an agreement reached. Legal

[1] *Proceedings of the National Arbitration and Peace Congress*, 1907, p. 44.
[2] Instructions to the American delegates to the Hague Conference, 1907, *Foreign Relations of the United States*, 1907, pt. ii, p. 1135.

questions, however, are not, or at least should not be, the subject of compromise. They should be decided according to principles of law which either exist or are created for the occasion; and courts of law have invariably supplanted arbitration as a better means of settling disputes of a justiciable nature between individuals.

Judicial process preferred to arbitration. Governor Baldwin's views.

An eminent American jurist, the Honorable Simeon E. Baldwin, Governor of the State of Connecticut and formerly Chief Justice of its Supreme Court, gives the reasons for preferring judicial procedure to arbitration in the following brief passage:

> It is a mode of procedure that has been always well known, but a trial before a court is generally preferred, even when both parties are desirous of obtaining a speedy and final determination of their dispute. They prefer it, because it provides judges chosen without reference to their attitude towards the controversy in question, and who are bound to follow fixed rules, adopted long before the controversy arose, for no other reason than that they were believed to be the rules of justice.[1]

It is reasonable to expect that nations will do in the long run between and among themselves what each nation has done within national lines, and that an international court of justice will be established for the impartial decision of legal questions, because the peoples of each and every nation are familiar with this process of settlement. We are justified in this belief because it is every-day experience that the small things with which we are familiar may be done on a larger scale; and it is only necessary to extend judicial process beyond national lines into the international field to provide an easy and satisfactory method of settling disputes of a legal nature, which could and would easily have been settled within national lines by judicial process. It is natural, however, that nations should move slowly—large bodies always do—and nations, even more than individuals, are prone to learn from experience.

International court as experiment proposed for nine nations.

An international court, therefore, will no doubt be regarded as an experiment, just as arbitration was until recently considered to be an experiment; and it is the part of wisdom to try the experiment under the most favorable conditions. A court for a limited number of nations mutually respecting each other and having confidence in each other's integrity, and devotion to justice and its administration, would seem to be easier to create than a court for the nations at large; and the proposal contained in this memorandum is for the formation of a

[1] SIMEON E. BALDWIN, The New Era of International Courts, *Bulletin of the American Society for Judicial Settlement of International Disputes*, 1910, p. 8.

truly permanent Court of Justice to be established at The Hague and installed in the Peace Palace, by Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan, the Netherlands, and Russia. The existence of such a court for the decision of legal or justiciable disputes which may arise among the nations creating it or parties to its operation would not mean the disestablishment of the present so-called Permanent Court of Arbitration. It would be but another and an additional guaranty for peaceful settlement; the so-called Permanent Court would still exist and could be resorted to by any nation which preferred it to the newer institution; and time, which settles all things, would determine which tribunal was best fitted to decide the disputes which needs must arise between nations. Indeed, it would seem that the two institutions are necessary, because each occupies, or may well occupy, a separate and distinct place in the international field, a fact pointed out by Mr. Léon Bourgeois in his careful and discriminating address at the Second Peace Conference advocating the proposed Court of Arbitral Justice:

Mr Léon Bourgeois' reasons for judicial court.

> As Mr. Asser has said: "There must be judges at The Hague." If there are at present no judges at The Hague, it is because the Conference of 1899, taking into consideration the whole field open to arbitration, intended to leave to the parties the duty of choosing their judges, which choice is essential in all cases of peculiar gravity. We should not like to see the court created in 1899 lose its essentially arbitral character, and we intend to preserve this freedom in the choice of judges in all cases where no other rule is provided.
>
> In controversies of a political nature, especially, we think that this will always be the real rule of arbitration, and that no nation, large or small, will consent to go before a court of arbitration unless it takes an active part in the appointment of the members composing it.
>
> But is the case the same in questions of a purely legal nature? Can the same uneasiness and distrust appear here? And does not every one realize that a real court composed of real jurists may be considered as the most competent organ for deciding controversies of this character and for rendering decisions on pure questions of law?
>
> In our opinion, therefore, either the old system of 1899 or the new system of a truly permanent court may be preferred, according to the nature of the case. At all events there is no intention whatever of making the new system compulsory. The choice between the tribunal of 1899 and the court of 1907 will be optional; and, as Sir Edward Fry has so well said, experience will show the advantages or disadvantages of the two systems.[1]

[1] Comme l'a dit M. Asser: Il faut qu'il y ait des juges à La Haye Mais s'il n'y en a pas actuellement, c'est parce que la Conférence de 1899, envisa-

Comment on Mr. Léon Bourgeois' views.

Accepting Mr. Bourgeois' distinction between the existing and the proposed institution as correct, it follows that disputes of a legal nature, which have assumed political importance through delay or mismanagement, may be referred to a temporary tribunal composed of judges of the parties' choice, in full confidence that the judges so chosen will adjust the difference "on the basis of respect for law," which is declared, in Article 15 of the Convention of 1899 for the pacific settlement of international disputes (Convention of 1907, Article 37), to be the object of international arbitration; whereas differences of a justiciable nature which have not been distorted by delay or mismanagement, and have not acquired a political importance which they did not originally possess, may be referred to and decided—not settled or adjusted—by a veritable court of justice, already in existence and composed of judges versed in law and trained in its application. It is not maintained that nations would submit to an international court all legal controversies, because the existence of a nation may be involved, as was the case in the dispute between Great Britain and the Transvaal; nor is it claimed that all political questions turn on a point of law. It is believed, however, that many if not most of the disputes between nations, other than questions of policy which are not ordinarily susceptible of judicial decision, result from an honest difference of opinion as to the existence or non-existence of a fact or series of facts, and as to the existence and applicability of a principle of law, and that if an international court were in existence possessing,

geant dans son ensemble le champ ouvert aux arbitrages, a entendu laisser aux parties le soin de choisir leurs juges, choix essentiel dans toutes les causes d'une gravité particulière Nous ne voudrions pas voir disparaître le caractère véritablement arbitral de la juridiction de 1899, et nous entendons maintenir ce libre choix des juges comme la règle supérieure et commune, pour tous les cas où une autre règle n'aura pas été stipulée

Dans les conflits d'ordre politique, notamment, nous pensons que cette règle sera toujours la véritable règle de l'arbitrage et qu'aucun Etat, petit ou grand, ne consentira à aller devant un tribunal arbitral s'il n'est pas intervenu d'une façon décisive dans la désignation des membres qui le composent.

Mais en est-il de même dans les questions d'ordre purement juridique? Ici les mêmes inquiétudes, les mêmes défiances peuvent-elles se produire? Et chacun ne conçoit-il pas qu'un tribunal véritable, formé de véritables jurisconsultes, peut être considéré comme l'organe le plus compétent pour trancher les conflits de ce genre et rendre des décisions sur de pures questions de droit

A nos yeux, c'est donc, selon la nature des affaires, l'ancien système de 1899, ou le nouveau système d'un tribunal vraiment permanent, qui pourra être préféré En tout cas il n'est nullement question de rendre obligatoire ce nouveau système; nul ne sera obligé d'user de l'un plutôt que de l'autre Le choix entre la Cour de 1899 et le Tribunal de 1907 sera facultatif. Et, comme l'a si bien dit Sir Edward Fry, c'est l'expérience qui fera ressortir les avantages ou les inconvénients des deux systèmes; c'est l'usage qui consacrera la meilleure des deux juridictions. *Deuxième Conférence de la Paix, 1907, Actes et documents,* vol. ii, pp 347-348.

because it deserved to possess, the confidence of nations, disputes would be submitted when and as they arose, and be decided before prejudice and passion had embittered relations and made a peaceful settlement difficult, if not impossible. Law regulates only a small portion of individual activity. It has grown to meet human needs, and there is no reason to believe that international law will not grow to meet the needs of nations, and to supply the rule of conduct to be observed in a particular case, if only the nations wish to have their conduct governed by principles of justice; and public opinion has become so enlightened that no nation would venture to assert that it is unwilling to act in accordance with principles of justice, if such principles exist and are found applicable to the dispute.

Court should exist at outbreak of controversy. List of arbiters not a court.

It would seem, therefore, that nations need to have a tribunal in being before or at the time of a controversy; for they, like the individuals of which they are composed, are not in a frame of mind to constitute an impartial tribunal under stress of passion and the excitement and impulse of the moment. This need is not met by a list or panel of judges from which a temporary tribunal can be formed. The list or panel is no doubt of service, because it calls the attention of prospective litigants to persons regarded by the nations as qualified to act as members of a temporary tribunal. But if we consider the composition of the dozen temporary tribunals which have been formed from the official list or panel of judges devised by the First Peace Conference, we see at once that the nations have not selected the judges indiscriminately from the list or panel, but that they have chosen diplomats and jurists from a very few countries; and it seems likely that these diplomats and jurists would have been picked out if the list or panel had not existed.

The following passage from a well-informed Dutch writer gives some interesting details upon the point in question:

Members of list or panel who have acted more than once as arbiters.

> In the space of about ten years, the Permanent Court of Arbitration settled twelve disputes. France was a party to six of these; America and England to five; Italy and Germany to three; Russia, Mexico, Venezuela, Sweden and Norway each to two; Spain, Belgium, Holland, Turkey and Peru each to one. In five of the cases, Dutch jurists, Asser, de Savornin Lohman and Loeff, acted as judges, and in the first, two Dutchmen sat at the same time; Swedish and Norwegian arbitrators, Professor Hammarskjöld and Minister Gram, sat in five of these disputes. France also was represented five times in the arbitration court, Professor Renault being chosen each time. Professor Lammasch of Austria, who was chosen judge four times, has also rendered very good

services; England was represented twice by Sir Edward Fry, once by Sir Charles Fitzpatrick, and once by Lord Desart; Russia twice by Professor de Martens, twice by Baron Taube, and once by Mandelstam, while Fusinato represented Italy in three of the arbitration courts. The prominent place that Holland occupies with Sweden in this list, is the more remarkable, if it is borne in mind that it has never submitted a case to the Permanent Court, and thus has never appointed a judge.[1]

It is no doubt highly gratifying to the Dutch author to note that his countrymen have been so often called upon to act as arbiters; but this fact seems quite natural to the foreigner who has long been accustomed to look upon Holland as the birthplace of the law of nations, and it is proper to observe in this connection that Grotius, born in but expelled from Holland, found a second home and congenial employment in Sweden, which, like Holland, has thus a special claim to the gratitude of international lawyers and indeed of the nations.

Special Hague tribunal really mixed commission.

But even supposing that the panel is of very great service, it nevertheless is a fact that the list is not a court, and that the temporary tribunal has to be formed by agreement of the parties. Practical experience in constituting the tribunal, shows that this is no easy matter, and that every endeavor is made to secure judges supposed to be favorable to the contentions of the country selecting them, or at least open to conviction. A tribunal thus constituted differs only in name from the mixed commissions antedating the Hague Peace Conference of 1899; and it is believed that the awards of the various temporary tribunals of The Hague are not superior to the awards of mixed commissions—certainly not superior to the decisions, for they were decisions, of the mixed commission organized under the seventh article

[1] Es sind also in einem Zeitraum von ungefähr 10 Jahren 12 Prozesse von dem permanenten Schiedshof entschieden worden. Bei diesen 12 Streitigkeiten war Frankreich sechsmal Partei, Amerika und England fünfmal, Italien und Deutschland dreimal, Russland, Mexiko, Venezuela, Schweden und Norwegen zweimal, Spanien, Belgien, Holland, die Türkei und Peru je einmal. Fünfmal sassen niederländische Juristen als Richter, nämlich Asser, de Savornin Lohman und Loeff, das erstemal sogar zwei Holländer zugleich; fünfmal auch schwedische und norwegische Richter, nämlich Professor Hammarskjöld und Minister Gram. Auch Frankreich hatte fünfmal Richter im Tribunal, und zwar stets Professor Renault. Sehr verdient gemacht hat sich besonders auch der Oesterreicher Professor Lammasch, der viermal Richter war; England sandte zweimal Sir Edward Fry, einmal Sir Charles Fitzpatrick und einmal Lord Desart, Russland zweimal Professor von Martens, zweimal Baron Taube und einmal Mandelstam, Italien dreimal Fusinato in ein Schiedsgericht Die hervorragende Stelle, die Holland in dieser Reihe neben Schweden einnimmt, ist um so merkwürdiger, wenn man bedenkt, dass es nie selber eine Sache vor den permanenten Hof gebracht, also nie einen Schiedsrichter eingesetzt hat. HENRI VAN DER MANDERE, Uebersicht über die Prozesse des Haager ständigen Schiedsgerichtshofes, *Zeitschrift für Völkerrecht,* vol. 7, p 255.

of the Jay treaty. But, supposing that the tribunal has been chosen from the list of judges of the so-called Permanent Court of Arbitration, and granting that the award is in form and in fact a decision of a court of justice upon the issue involved, it nevertheless only binds the parties to the controversy. Other nations are unaffected by the judgment. It is not a precedent binding other and later tribunals, and it can only be considered a precedent in so far as other nations may find it to their advantage to follow it.

Award only binds parties in litigation before tribunal.

It needs neither argument nor the citation of authority for the statement that the award only binds the parties to it, for, as the dispute arises between two countries, and as they agree to refer it to a tribunal which they alone constitute, it necessarily follows that the decision affects them alone, and does not define the rights and duties of other nations which take no part in the proceedings. It is alike a fundamental principle of national and of international law that judgments of courts only bind the parties before them. Lord Mansfield once stated that some things are so clear that they can only be obscured by argument, and this would appear to be one of them. But if argument be excluded, authority may be invoked, and the authority is none other than the Convention of 1899 for the pacific settlement of international disputes, creating the so-called Permanent Court. Article 56 of this important document says:

> The award is only binding on the parties who concluded the *compromis*.
>
> When there is a question of interpreting a convention to which powers other than those concerned in the dispute are parties, the latter notify to the former the *compromis* they have concluded. Each of these powers has the right to intervene in the case. If one or more of them avail themselves of this right, the interpretation contained in the award is equally binding on them.[1]

Award does not bind other or later tribunal

It has been stated that the award of a special or temporary tribunal does not bind another or a later tribunal, because each is a special, separate, and distinct tribunal. The tribunal is created for the settlement of a dispute. It passes out of being when this dispute is settled. It may be composed of the same or of different judges; but it is a

[1] La sentence arbitrale n'est obligatoire que pour les Parties qui ont conclu le compromis

Lorsqu'il s'agit de l'interprétation d'une convention à laquelle ont participé d'autres Puissances que les Parties en litige, celles-ci notifient aux premières le compromis qu'elles ont conclu Chacune de ces Puissances a le droit d'intervenir au procès. Si une ou plusieurs d'entre elles ont profité de cette faculté l'interprétation contenue dans la sentence est également obligatoire à leur égard. Cf. also Article 84 of 1907

different tribunal, and the parties before it are different parties. The first tribunal was invested with the power to decide the issue and the parties agreed in advance to accept the award. It is therefore binding upon them, but not upon other nations which did not agree to be bound by it, and whose rights and duties are not affected by it. In like manner the subsequent tribunal is the agent of the parties constituting it. Its award binds them, because they have agreed to be bound. The later tribunal may consider and follow the finding of the former, if it appears to be in point, but the tribunal is not obliged to do so. There is no necessary connection between them. They are but separate links. They are not bound together, and can not be, except by action of the nations.

Awards of mixed commissions of special tribunals not precedents.

A distinguished American jurist, Mr. Eugene Wambaugh, professor of law in Harvard University, has examined the effect of awards of commissions and the extent to which they may be considered as precedents, and his conclusion, in strict accordance with fact, deserves quotation:

> As a commission is temporary, passes upon only one question or series of questions, and has no responsibility as to future problems—all of which points, by the way, characterize the commissions which may from time to time be selected from the so-called Permanent Court of Arbitration at The Hague—what has been said of the development of a science through courts disappears when the discussion passes to commissions. Nor are the decisions of commissions habitually supported by statements of legal propositions. The opinions of such commissions are not, as a matter of fact, treated as a source of law. They are seldom quoted, or even cited, in international law treatises. Nor are they dealt with as valuable proofs of law by later international commissions. In other words, each case is decided as if it were an isolated problem, sporadic, never occurring before and never to occur again. Finally, there is not, and can not be, a bar of counselors learned in the science of the law of commissions; for that science is nonexistent. The state of affairs was approximately described by Milton, when, dealing with another matter, he wrote:
>
> Chaos umpire sits,
> And by decision more embroils the fray
> By which he reigns: next him high arbiter
> Chance governs all [1]

Arbiters often mediators or friendly composers of difference rather than judges

In the next place, the procedure before a temporary tribunal is long drawn out, a defect due to the circumstances and the conditions under

[1] *Proceedings of the American Society for Judicial Settlement of International Disputes,* 1910, pp 144-145.

which the tribunal is constituted and acts, rather than to its members. The arbiters of the moment have not had the experience of working together. They are strangers to each other and unfamiliar with the nature of the proceedings. They have been brought together to settle a dispute, and they naturally look upon themselves as invested with a mission to adjust the controversy to the satisfaction of the governments which appointed them, instead of deciding it according to abstract principles of law, and instead of contributing by their decisions to the development of international law. Leading partisans of arbitration in the First and Second Hague Peace Conferences opposed the right of revision on the ground that, by express agreement of the governments, an arbitral award put an end to the controversy, and that a provision for an appeal would prolong the dispute which the special tribunal was appointed to settle once and for all. Although the litigating nations can, by Article 55 of the Convention of 1899 (Convention of 1907, Article 83), reserve the right of revision in the *compromis,* nevertheless the opponents of revision and of appeal were largely successful in their endeavors, as appears from Article 54 of the Convention of 1899, which says:

> The award, duly pronounced and notified to the agents of the parties at variance, puts an end to the dispute definitively and without appeal.[1]

Indeed, a recent writer on this subject, who has himself had experience both as arbiter and umpire in special tribunals formed under the Hague Convention, insists that the duty of the tribunal is to decide the question submitted, not necessarily to develop international law; that the arbiters should seek to keep the nations at peace even at the expense of principles of law; and that the test of the award is its acceptability to the governments in controversy.[2]

Professor Lammasch's views on arbitration and on duties of arbiters.

Thus, Professor Lammasch, to whom reference is made, says in his recent and very valuable work on The Legal Effect of International Awards:

> The mission of the arbitral award is at the present day universally considered to be to *decide* the controversy and authoritatively adjust the dispute.[3]

[1] La sentence arbitrale, dûment prononcée et notifiée aux agents des Parties en litige, décide définitivement et sans appel la contestation. Cf. Conv. of 1907, Article 81.

[2] LAMMASCH, *Die Rechtskraft Internationaler Schiedssprüche,* 1913, pp 4, 28, 52, 62.

[3] Die Aufgabe des Schiedsspruches wird heute ganz allgemein dahin auf-

This conception, as the learned author is careful to say, is essentially modern; as recently as the middle of the nineteenth century arbitral awards were often diplomatic adjustments. To quote his exact language: "This conception only gradually made its appearance. Even in the arbitral awards in the middle of the nineteenth century, especially in those delivered by sovereigns, we find a certain uncertainty of expression, which is the consequence of the fact that arbitral procedure was not so much a matter of law as a diplomatic expedient." [1]

In speaking of the manner in which arbitral awards become invested with the force of precedents, he says:

> Especially will this happen, if arbitral courts apply, in several cases, principles which have not been hitherto recognized as firmly established. However valuable this effect of arbitral decision may be, it is not its direct purpose.[2]

From these two extracts it is clear that the duty of the mixed commission or the temporary tribunal is to decide the case, not necessarily to develop law. In the next passage the duty of the arbiters is stated to be to keep peace between the parties, even at the expense of that law which they are called upon to administer and through whose passionless and impartial application precedents can be developed:

> We should not forget that the arbitral court has not merely the mission to find law but to keep peace between the states. It would not fulfil this mission, if it acted in accordance with the maxim: *Fiat justitia, pereat mundus.* A judicial body that in such a case would not take pains to avoid such severity in the judgment as is not indispensable to an essentially just judgment, would prevent the defeated and perhaps also the victorious party from submitting disputes in the future to arbitral adjustment. It may be in this way that law in the concrete case loses something of its fullest triumph.[3]

gefasst, dass er die betreffende Streitfrage zu *entscheiden* und den Streit autoritativ zu schlichten habe. *Ibid.*, p. 28.

[1] Diese Auffassung ist aber erst allmählich zum Durchbruche gelangt. Noch in Schiedssprüchen aus Mitte des 19. Jahrhunderts, insbesondere in solchen, die von Souveränen gefällt wurden, finden wir eine gewisse Unsicherheit des Ausdruckes, die die Folge davon ist, dass das Schiedsverfahren nicht so sehr als Rechtsinstitut, sondern vielmehr als diplomatisches Expediens aufgefasst wurde. LAMMASCH, *Die Rechtskraft Internationaler Schiedssprüche,* 1913, pp. 28-29.

[2] Insbesondere dann wird dies eintreten, wenn Schiedsgerichte in mehreren Fällen Grundsätze, die bis dahin nicht als völlig feststehend anerkannt waren immer wieder zur Anwendung gebracht haben. So wertvoll diese Wirkung der Schiedssprechung auch ist, ihre *unmittelbare* Aufgabe ist sie nicht. *Ibid.*, p. 4.

[3] Wir dürfen nicht vergessen, dass das Schiedsgericht nicht bloss die Aufgabe

And in a final passage, which deserves quotation, Dr. Lammasch says:

> It is a proof that the arbitral court has done its duty, especially if both parties are pleased with the award, even although some hypercritical people may find fault with it and accuse the court of playing the diplomat.[1]

Arbiters of special tribunal lack *esprit de corps.*

If the function of the arbiter is as described by the distinguished jurist whose views have been quoted—and it is believed that his views are shared by many, if not by the majority, of continental publicists, and that they state accurately present practice—it is evident that international law is not likely to be developed by arbitral awards. We do not expect much from raw recruits who have just joined the colors; they form a mob until by practice and discipline they have become an army, united by an *esprit de corps.* This process takes time, but the time spent in drilling recruits is justified by the results. It would no doubt be unfair to compare the hundred or more judges of the Permanent Court to a company of "recruits"; but bearing in mind the heterogeneous elements composing the list—statesmen and politicians, diplomats and jurists, residing in different countries, having different standards of conduct, trained, if trained at all, in different systems of law and speaking different languages—we must perforce admit that the analogy is not wholly fanciful, and that the list of judges lacks that *esprit de corps* which can only come from common training and association. A tribunal of three or five does not necessarily possess the spirit essential to a court; for this spirit does not depend upon numbers, but upon training and association in a common work; and it may be accepted without argument that the members of any tribunal who may be personally unknown to each other, and who have not worked together toward a common purpose, can not be expected to approach their task with the poise and the confidence, the ease and the grace,

hat, Recht zu finden, sondern auch den Frieden zwischen den Staaten zu bewahren Diese Aufgabe würde es nicht erfüllen, wenn es nach dem Satze handelte: *Fiat justitia, pereat mundus* Eine Judikatur, die in einem solchen Falle sich nicht bemühen würde, solche Schärfen des Urteils zu vermeiden, die für das Wesen eines gerechten Spruches nicht unentbehrlich sind, würde den unterliegenden Staat und vielleicht sogar den obsiegenden abhalten, in Zukunft wieder Streitigkeiten schiedsgerichtlich auszutragen. Es mag sein, dass auf diese Weise das Recht im konkreten Falle von seinem vollsten Triumphe etwas einbüsst. *Ibid.*, pp 62-63

[1] Insbesondere dann, wenn beide Parteien mit dem Spruche zufrieden sind, ist dies ein Beweis, dass das Schiedsgericht seine Pflicht getan hat, mögen auch einzelne Hypertheoretiker daran etwas zu bekritteln haben, ihm den Vorwurf des "Diplomatisierens" machen LAMMASCH, *Die Rechtskraft Internationaler Schiedssprüche,* 1913, p. 52.

the firm and unhesitating step with which professional judges enter a court of justice.

Proceedings before temporary tribunals lengthy.

Nor is it to be demanded that judges coming together for a particular occasion will promptly dispose of the case. Experience shows that the procedure before such a tribunal is, as has been stated, long drawn out, for the judges are almost as unfamiliar with the procedure of the tribunal as are the lawyers, and they can not control proceedings before them with the authority possessed by judges accustomed to the trial of cases. Leaving out difference of training and the difficulty of languages, which in themselves make the administration of justice difficult, the primary object of the arbiters is to adjust the case to the satisfaction of the governments which appointed them, not necessarily to discover and apply principles of law as is the case with national judges. Negotiation and judicial process are different, and the first is more time-consuming than the second.

Continuity of decision lacking.

The fact that arbiters are animated by the laudable desire to end the dispute, rather than to decide it according to law and by so doing to confirm, perhaps to develop international law, and the further fact that they may not sit again as a court before which their award can be cited as a precedent, naturally lead them to think more of the present than of the future; so that the continuity of decision characteristic of, if not absolutely inherent in a court of justice and indispensable to the slow and conscious development of law, is lacking.

Temporary tribunals suspected of compromise.

The great objection to a temporary tribunal composed for the special occasion is its tendency to compromise divergent and inconsistent contentions, a defect which seems to be inherent in the very nature of arbitration, which has heretofore been looked upon as an adjustment or a settlement rather than as a judicial decision. This drawback to arbitration as at present understood is real, not fanciful; but even if it were imaginary, the cause would be prejudiced; for, as Lord Mansfield aptly said, it is not enough that the decision is just, it must appear to be just, or, if a somewhat trite classical allusion be permitted, Caesar's wife must be above suspicion.

Mr Root's views on subject of arbitration, composition of temporary tribunals and judicial procedure

The reasons for suspecting arbitration and the remedy for overcoming the suspicion are thus pointed out by Mr. Root:

> I have said many times and in many places that I do not think the difficulty that stands in the way of arbitration to-day is an unwillingness on the part of the civilized nations of the earth to submit their disputes to impartial decision. I think the difficulty is a doubt on the part of civilized nations as to getting an impartial

decision. And that doubt arises from some characteristics of arbitral tribunals, which are very difficult to avoid.

In the first place, these tribunals are ordinarily made up by selecting publicists, men of public affairs, great civil servants, members of the foreign offices, men trained to diplomacy; and the inevitable tendency is, and the result often has been, in the majority of cases has been, that the arbitral tribunal simply substitutes itself for the negotiators of the two parties, and negotiates a settlement. Well, that is quite a different thing from submitting your views of right and wrong, your views of the facts and the law on which you base your claims to right, to the decision of a tribunal, of a court. It is merely handing over your interests to somebody to negotiate for you; and there is a very widespread reluctance to do that in regard to many cases; and the nearer the question at issue approaches the verge of the field of policy, the stronger the objection to doing that.

Another difficulty is that the arbitral tribunals, of course being made up largely of members from other countries, the real decision ordinarily being made up by arbiters who come from other countries, and not from the countries concerned, questions have to be presented to men trained under different systems of law, with different ways of thinking, and of looking at matters. There is a very wide difference between the way in which a civil lawyer and a common-law lawyer will approach a subject, and it is sometimes pretty hard for them to understand each other, even though they speak the same language, while if they speak different languages it is still more difficult.

Another difficulty is that a large part of the rules of international law are still quite vague and undetermined, and upon many of them, and especially upon those out of which controversy is most likely to arise, different countries take different views as to what the law is and ought to be. And no one can tell how one of these extemporized tribunals, picked at haphazard, or upon the best information the negotiators of two countries can get—no one can tell what views they are going to take about questions of international law, or how they are going to approach subjects and deal with them.

Now it has seemed to me very clear that in view of these practical difficulties standing in the way of our present system of arbitration, the next step by which the system of peaceable settlement of international disputes can be advanced, the pathway along which it can be pressed forward to universal acceptance and use, is to substitute for the kind of arbitration we have now, in which the arbitrators proceed according to their ideas of diplomatic obligation, real courts where judges, acting under the sanctity of the judicial oath, pass upon the rights of countries, as judges pass upon the rights of individuals, in accordance with the facts as found and the law as established. With such tribunals, which are continuous, and composed of judges who make it their life busi-

> ness, you will soon develop a bench composed of men who have become familiar with the ways in which the people of every country do their business and do their thinking, and you will have a gradual growth of definite rules, of fixed interpretation, and of established precedents, according to which you may know your case will be decided.[1]

Lest it be thought that the movement for judicial settlement is confined to the United States, the undersigned begs to quote the measured language and the unhesitating approval of judicial decision as distinct from arbitral adjustment, of an eminent European publicist, Mr. Ernest Nys, who recently said:

Mr. Nys on same subjects.

> Arbitration is beset with various difficulties. There is the difficulty of bringing the parties in controversy before the arbitrator; the tendency on the part of the arbitrator, alike in private as well as in international law, to consider himself obliged to deal tenderly with the interests of the parties by whom he was designated; the regrettable tendency to dispose of the litigation by means of a compromise, to act as a diplomat and not as a judge; the impossibility of creating a system of jurisprudence based upon an unbroken series of consistent decisions, and the consequent difficulty of developing law by successive decisions, and the insuperable obstacles which almost invariably stand in the way of revising sentences vitiated by essential error or other substantial defects. On all these points the experience of recent years has been conclusive. The sole remedy is the creation of a technical tribunal in which jurists will take their places, where the same line of judgment will necessarily control and decide similar cases, thus enriching the jurisprudence of international law, and where an appeal will correct errors of judgment which may have crept in the judgment of first instance.[2]

Memorandum has heretofore dealt with defects of arbitration and of temporary tribunal; from here on it considers advantages of judicial settlement by means of truly permanent court of justice.

In the course of these somewhat general observations the shortcomings of arbitration as it seems to the undersigned to be understood and practiced, have been pointed out; and the advantages of judicial settlement as opposed to arbitration, and of a permanent judicial tribunal as contrasted with a temporary arbitral tribunal have been suggested in passing, without dwelling upon them in detail. It is, however, necessary to enumerate the advantages of a permanent international court of justice, and to state, although in summary form, the services it can reasonably be expected to render to the nations creating it, not the

[1] *Proceedings of American Society for Judicial Settlement of International Disputes,* 1910, pp. 11-13

[2] ERNEST NYS, The Necessity of a Permanent Tribunal, *Bulletin of American Society for Judicial Settlement of International Disputes,* 1910, pp. 25-26

least important of which will be the example of settling their legal disputes by judicial process.

It has been suggested that if a permanent tribunal exists with its composition known in advance and ready to receive the case when presented to it, pressure may be brought upon the nations in controversy to submit their dispute without the delay which would necessarily occur in the formation of a temporary or special tribunal. This advantage of a permanent court is so evident that it may seem useless to dwell upon it, but it is so important, indeed, fundamental, that it should be considered at some length.

Existence of court facilitates judicial settlement of private disputes.

Individuals know that if they can not agree, they must submit their quarrel, if it be of a legal nature, to a court of justice, and the knowledge that they must do so, and the existence of the court, ready to receive and to decide the case, either leads to settlement out of court or to prompt submission of the case to the court. It would be intolerable to prospective litigants if a special board or commission had to be appointed, with or without the operation of government for the trial of their case or cases. Judicial process is so familiar, indeed so commonplace, that we hardly stop to think that time was when courts did not exist; that arbiters were appointed by agreement of the parties to avoid self-redress, and that from private arbitration by agreement of the parties, courts of justice have grown as affording a speedier and more adequate remedy than arbiters or temporary tribunals for the settlement of disputes arising between individuals. There is every reason to believe that nations will one day be convinced of the advantage of permanent tribunals, for the decision of their legal disputes, for nations are, after all, nothing but peoples, grouped more or less artificially and familiar with judicial process; and the historian of the future will look back with wonder and amazement to the time when nations did not settle their justiciable disputes by judicial process, and did not organize permanent courts for their trial and disposition. Indeed it may be said in this connection that not only has arbitration by private agreement or contract led to permanent and official tribunals, for which the history of Rome could be vouched, but also that states which had constituted temporary tribunals for the settlement of their controversies have rejected such temporary tribunals in favor of permanent ones.

Relation of self-redress, arbitration and permanent judiciary.

It could easily be shown, if it were not thought irrelevant to the present purpose, that self-redress, everywhere existing in primitive society, yielded to arbitration of disputes among its members, by means of private contract between the disputants, by arbiters or judges

of the parties' own choice, selected for the particular occasion; that in the case of Rome, the state, through the appropriate magistrate, cooperated with the parties in framing the issue, leaving, however, to the parties the choice of the arbiters or judges; that an *album judicum,* not unlike the list or panel of judges created by the First Peace Conference, was prescribed by law and drawn up and published by the magistrate to facilitate the choice of arbiters or judges; and that, finally, in the reign of Diocletian the system of arbitration by contract of the parties, with, however, the coöperation of the state, was discarded for permanent judicial officers appointed by the state from among its members. Were it not self-evident the analogy could be pointed out between the development of arbitration between the nations and arbitration within Rome, for nations stay self-redress by contract—a treaty is nothing more than a contract—and through arbiters or judges of their own choice, selected from the newer *album judicum,* adjust their differences until such time as arbitration shall, as in Rome, develop into judicial decision by a permanent judiciary. But it would be improper to do more in this place than to call attention to the development from arbitration to judicial settlement, and to mention the analogy which it is hoped time will render complete. The undersigned deems it, however, relevant to state the steps by which the United States and Switzerland have discarded the arbitration of public differences by means of temporary commissions or tribunals for judicial decisions by a permanent court of justice.[1]

The law of evolution in judicial development.

But before proceeding further it nevertheless seems proper to comment briefly upon the statements just made rather than to leave them as mere assertions; for if these statements are really true, and it is believed that they are true beyond the possibility of successful contradiction, it follows that arbitration, however important it may be in the administration of justice and in the evolution of judicial proceedings, is not an end in itself nor the culmination of development, but a mere step, albeit a very important one, between self-redress on the one hand and a permanent judiciary on the other; and that, just as arbitration in the beginning stayed self-redress by an appeal to reason, it later generated judicial procedure by which the appeal to reason has been made effective. That is to say, there is a law of evolution in the judicial as in the animate world and that law is from self-redress

[1] For the details of this interesting development, see an article by ERNEST NYS, entitled "The Development and Formation of International Law" (*American Journal of International Law,* 1912, vol 6, p 279 *et seq*, especially pp 297-299), and an article by the undersigned, entitled "The Evolution of a Permanent International Judiciary" (*Ibid*, pp 316-358).

through arbitration to judicial proceedings in a permanent judiciary, at least in that one country whose legal history we know and whose law is to-day, after the lapse of a thousand years and more, the basis of the law of many nations and a fruitful and unfailing source of international law itself.[1]

A second element in this law of judicial evolution, as it appears from the history of Roman legal institutions, is that the special tribunal composed of judges of the parties' choice, gives way to a permanent judiciary, composed of permanent judges, chosen not merely for the decision of the case as it arises, but in existence before the case has arisen and ready to receive and to decide it.

But this law of judicial evolution is of universal application and is therefore not less true of the nations of the world than of the greatest of them in times past with whose history we are familiar. Self-redress has existed and, to a certain extent, does still exist between and among nations, but arbitration by contract—for treaty is contract—by judges of their own choice, has made its appearance in international practice; a panel has been created and exists from which judges are selected by the litigating nations just as a panel of judges was created and existed at Rome from which the litigating parties chose the judge or arbiters; special commissions or special tribunals, where they have existed between and among states claiming and exercising sovereignty, have produced permanent judiciaries in the United States and Switzerland, just as the special tribunals of private litigants produced the permanent judiciary of Rome; and finally, for the analogy is complete although unconscious and more persuasive and inevitable because unconscious, the nations are, slowly it may be but nevertheless surely, developing a permanent international judiciary in accordance with the law of judicial evolution which the undersigned has felt himself justified in formulating in this connection.

From the Declaration of Independence of 1776 until the Articles of

[1] "The history of the venerable system of the civil law is peculiarly interesting. It was created and gradually matured on the banks of the Tiber, by the successive wisdom of Roman statesmen, magistrates and sages; and after governing the greatest people in the ancient world, for the space of thirteen or fourteen centuries, and undergoing extraordinary vicissitudes after the fall of the western empire, it was revived, admired and studied in modern Europe, on account of the variety and excellence of its general principles It is now taught and obeyed, not only in France, Germany, Holland, and Scotland, but in the islands of the Indian Ocean, and on the banks of the Mississippi and the St. Lawrence. So true, it seems, are the words of d'Aguesseau, that 'the grand destinies of Rome are not yet accomplished; she reigns throughout the world by her reason, after having ceased to reign by her authority.'" KENT'S *Commentaries on American Law*, 1st ed (1826), vol. i, p. 481.

Development of a permanent judiciary in the United States.

Confederation of July 9, 1778, and their final adoption in 1781, the erstwhile Colonies of Great Britain, which then constituted the United States of America, were independent states and their government was a purely provisional one, by which they acted in unison for the maintenance of their cause. They regarded themselves as independent and equal states and treated with one another upon the basis of independence and equality. They had many disputes concerning their boundaries, due to the overlapping of colonial charters, which they endeavored to adjust by diplomatic methods and the appointment of commissioners. The methods of diplomacy were apparently unsatisfactory, and in Article 9 of the Articles of Confederation, provision was made for the adjustment of disputes between the states by a temporary tribunal whose judges were to be selected from a panel or list of thirty-nine commissioners or judges. Congress was to be the last resort in controversies between the states over boundaries, questions of jurisdiction, and other matters. When the authorities or authorized agents of a state petitioned Congress to settle a dispute or difference, notice of the fact was given to the other state in controversy and a day set for the appearance of the two parties by their agents, who were thereupon directed to appoint members of the tribunal by common consent. Failing an understanding, Congress designated three citizens of each of the states of the Confederation, and from the list thus formed each party, beginning with the defendant, struck alternately a name until only thirteen names remained. From these thirteen, seven or nine names were drawn by lot, and the persons thus designated composed the court, which decided the controversy by a majority of votes. A quorum of at least five judges was required. In case of non-appearance of one of the parties without a valid reason, or of refusal to take part in the formation of the tribunal, the Secretary of the Congress performed this duty in its stead. The award was final in all cases, and each state pledged itself to carry out the award in good faith. Each commissioner was required to take an oath before one of the judges of the supreme or of the superior court of the state in which the tribunal sat "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection or hope of reward."

It will be noted that the members of the tribunal could be appointed by common consent, just as Article 24 of the Hague Convention of 1899 (Convention of 1907, Article 45) for the pacific settlement of international disputes provides that the composition of the tribunal may be by a direct agreement of the parties. Failing this agreement, the

appointment of the judges is secured by express regulation (Articles 24 and 45 of the Conventions; Article 9 of the Articles of Confederation). It appears that under the ninth article of the Articles of Confederation, one controversy was finally determined (Pennsylvania v. Connecticut); that commissioners were appointed by mutual agreement in two controversies, which were, however, settled out of court (Massachusetts v. New York; South Carolina v. Georgia), and that there were petitions for the appointment of a court in some two or three other cases.

It is of more than passing interest to note that the dispute between Pennsylvania and Connecticut was of very considerable importance and involved the possession of Wyoming Valley, now Luzerne County, in Pennsylvania, which territory was claimed by each state as included within its charter. The court was appointed by direct agreement of the parties, and it consisted as finally constituted of five persons, who met at Trenton, New Jersey, and rendered a unanimous judgment in favor of Pennsylvania on December 30, 1782.

In the case of Massachusetts v. New York, the parties likewise agreed (June 9, 1785) to the composition of the temporary tribunal, consisting of nine judges, without resorting to the method of striking out, provided for by the ninth article, but this dispute was settled out of court by express agreement of the parties (December 16, 1786).

The case of South Carolina v. Georgia is the only instance of the composition of the temporary tribunal by alternately striking off, upon motion of Georgia, names from the list of thirty-nine commissioners or judges, until but thirteen remained. From the list thus reduced, nine names were drawn to form the court (September 13, 1785), but it never met, as the states agreed to settle their difference by compact.

The procedure can not be said to have been satisfactory in view of the few instances in which it was employed, and of the further fact that it was specifically rejected by the Constitutional Convention of 1787. That it was regarded as an improvement upon diplomatic adjustment, whatever its imperfections may have been, is evidenced by the fact that its main principles figured as Article 9 in the proposed Constitution reported by the Committee of Detail, presented to the Constitutional Convention on August 6, 1787. After profound and prolonged discussion the Convention rejected the method of settling controversies between the states by means of temporary commissions, which thus passed out of existence; but in doing so it gave birth to a permanent judiciary, invested with the power to determine such con-

troversies, as appears from Article 3, Section 2, of the Constitution as ultimately adopted:

> The judicial power shall extend . . . to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Thus arbitration between the states by means of a temporary tribunal, composed for the particular case, developed into a permanent tribunal for the settlement of controversies between the states of the American Union. Its success in this capacity has justified the expectations of its framers. It has received and passed upon many a dispute, which, to quote the impressive language of Mr. Justice Holmes, "if it arose between independent sovereignties, might lead to war."[1] We can not resist the question: Will history repeat itself?

Development of a permanent judiciary in Switzerland.

In like manner the example of Switzerland may be cited, where for centuries arbitration was not merely the practice of individuals, but the method of settling disputes between the cantons, which regarded themselves as sovereign and exercised the rights of sovereignty. From 1291 to 1351, arbitration by self-constituted arbiters was the favorite method of settling disputes between the cantons; but from 1351 to 1848, temporary tribunals were composed by joint action of the cantons in dispute to settle their controversies. Arbitration was thus tested, not during a decade, as in the case of the United States, but during centuries, and it was discarded in the year 1848 because it did not possess, in the opinion of the Swiss burghers, the advantages of judicial settlement. The arbiters regarded it as their duty to compromise the dispute, and before attempting to apply principles of law to its settlement, they proposed an adjustment, which, if accepted by the parties, ended the controversy. If not accepted, they then decided the question according to what they believed to be principles of law and justice. It is thus seen that mediation and compromise were regarded during a long period of time as inherent in the nature and practice of arbitration; but a long and varied experience convinced the Swiss—as jealous of their independence, national and cantonal, as any people that ever existed—that arbitration by temporary tribunals composed of judges of the cantons' choice did not adequately adjust disputes of a legal nature. They therefore renounced the system of

[1] Missouri v Illinois, 200 United States Reports, 496, at p 518.

arbitration in the year 1848, and replaced it by the present permanent federal tribunal.

A distinguished Swiss publicist, at one time president of the Confederation and of the Federal Tribunal whose advantages he states, says, in speaking of arbitration, that

> The drawbacks of this system are in general numerous. In the first place, the constitution of a tribunal for each case and the necessity of agreeing upon certain rules of procedure in every instance, require a disproportionate expenditure of energy. Again, there is no guarantee that the composition of these tribunals will be impartial, and a certain equality of the parties is obtained only by doubling the evil of the partial composition of the tribunal and thus neutralizing it to some extent. Then, in these occasional tribunals (*tribunaux de hasard*) the organization of the procedure is defective, and it is consequently difficult to follow the details of the case. Moreover, the case itself frequently drags on to great length and becomes exceedingly expensive. Finally, questions of jurisdiction and all kinds of difficulties arise concerning the execution of the awards, so that even the result, which has been reached with so much trouble, is uncertain.[1]

In another passage, which although written with an eye to Switzerland is nevertheless capable of a broader, indeed an international application, the same publicist writes:

> When political association becomes more intimate and consistent, progress leads generally and naturally to the legally organized tribunal. Many advantages result from this. A judge is appointed for a whole series of cases without reference to any particular case. Those who appoint him are absolutely impartial and can carefully weigh his moral qualifications and technical ability; a fixed order of procedure, substantial continuity in the decision of cases, and clearness in execution, spring into being. Finally, the power of the judge becomes a strong bulwark in public life against whims and arbitrariness, from whatever source they may arise. The advantages of a legal regulation of judicial functions far outweigh the few drawbacks that may exist, particularly when the right is reserved to resort, in certain special cases, to tribunals of arbitration and to challenge a judge in an ordinary tribunal, who, in an individual case, may lack the indispensable quality of impartiality.[1]

It may be objected, however, that permanent tribunals of the kind specified are only possible in a federal state the members of which

[1] DUBS, *Droit Public de la Confédération Suisse*, 1878, vol ii, pp. 113-114.

have renounced their sovereignty, and that the establishment of an international tribunal presupposes something of an approach to a federation of the world.

Indeed, Professor Lammasch has voiced this criticism, saying in a recent publication that "this reference is not in point to one who does not believe in the federation of the world." [1]

In reply, it is proper to observe that the states of the American Union consider themselves to be sovereign states—not provinces possessing local self-government, and that the cantons of Switzerland specifically declare in Article 3 of the Constitution of 1874 that they are sovereign "so far as their sovereignty is not limited by the Federal Constitution," and that they "exercise the rights which are not delegated to the Federal Government."

Establishment of proposed court neither presupposes nor requires federation of the world.

If the establishment of an international court depended upon the federation of the world, the undersigned would not favor it, as he believes in the independence and equality of states, whether they be large or small, or whether their peoples be many or few. He would consider a federation of the nations for all purposes not merely as a calamity in itself, but as destructive of international law, as he is firmly convinced that the prosperity of the world at large is based upon the separate and independent existence of nations and their coöperation as such independent and separate nations for a common purpose towards a common goal.

The creation and successful operation of the many international unions, too numerous to mention in this connection, show that nations may safely form unions for particular purposes without the sacrifice of independence—indeed, sovereignty and independence are not necessarily involved, as self-governing colonies are members—and there seems to be no essential difference between the establishment of a Universal Postal Union for a special purpose and the creation of a judicial union for the administration of justice between states.

A judicial union like the Universal Postal Union is all that is required.

It appears, therefore, that a judicial union of all members of the society of nations, or of a limited number of them, is possible, without impairing the independence and equality of nations, which are fundamental concepts of international law, just as a Universal Postal Union, with an agreement of the parties to such a convention for the settlement of their postal disputes by arbitration, has been and is

[1] Für den, der nicht an die Weltföderation glaubt, ist dieser Hinweis jedoch nicht bestimmend. LAMMASCH's Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange (*Handbuch des Völkerrechts,* herausgegeben von Dr. Stier-Somlo, dritte Abteilung, erster Abschnitt, 1913, p. 139).

practicable. Thus, Article 43 of the Universal Postal Convention, signed at Rome, May 26, 1906, provides:

> 1. In case of disagreement between two or several members of the Union, relating to the interpretation of the present Convention or to the responsibility of an administration arising from the application of the said Convention, the question in dispute is regulated by an arbitral judgment. For this purpose each of the administrations concerned chooses a member of the Union not directly interested in the matter.
>
> 2. The decision of the arbiters is rendered by an absolute majority of votes.
>
> 3. In case the votes are equally divided, the arbiters choose, to decide the difference, another administration equally disinterested in the dispute.
>
> 4. The provisions of the present article apply equally to all arrangements concluded by virtue of Article 19 of this Convention.[1]

What has been done in one case may be done in another. It is impossible to hold that a union of nations for postal matters is feasible, and that a similar union of nations for the settlement of their legal disputes is not feasible. A permanent tribunal can, it is submitted, be created either for all nations, or for such of them as wish to create such a tribunal. For reasons which have been previously stated and will be developed later at greater length, it will be easier to create a tribunal for a limited number of nations than one for all nations recognizing and applying international law in their mutual relations. And it is confidently affirmed that a permanent tribunal, composed of judges ready and willing to decide disputes submitted to them, would by its mere existence attract disputes, and by their prompt and impartial determination, contribute to the maintenance of peace; for, in the opinion of the undersigned, peace can only be permanent, and is only desirable, when based upon principles of justice.

It has been stated that arbitral awards are more or less in the nature

[1] 1° En cas de dissentiment entre deux ou plusieurs membres de l'Union, relativement à l'interprétation de la présente Convention ou à la responsabilité dérivant, pour une Administration, de l'application de ladite Convention, la question en litige est réglée par jugement arbitral A cet effet, chacune des Administrations en cause choisit un autre membre de l'Union qui n'est pas directement intéressé dans l'affaire.

2° La décision des arbitres est donnée à la majorité absolue des voix

3° En cas de partage des voix, les arbitres choisissent, pour trancher le différend, une autre Administration également désintéressée dans le litige

4° Les dispositions du présent Article s'appliquent également à tous les arrangements conclus en vertu de l'Article 19 précédent *Recueil des Traités du XX^e siècle,* 1906, p 340.

of compromises, and the fear has been expressed that nations will prefer to compromise disputes through their direct agents, rather than through arbiters not directly responsible to them. The truth of the first statement can, it is believed, be established by an examination not merely of the awards of mixed commissions but of the awards of the so-called Permanent Court of Arbitration, but for present purposes the truth of the statement will be assumed.

Arbitral awards smack of compromise.

The second statement can not be proved, although it would appear evident from analogy that nations, like individuals, would prefer to have their controversies settled by a method which enables them to predict in advance the probable consequences, and to weigh and balance the advantages and disadvantages of the probable decision, before the case is submitted to the court. It is not maintained that the decision of a court of justice can be predicted with absolute certainty, for, in final analysis, the decision turns upon the existence and application of a principle of law contended for by one litigant, or upon the existence and application of a different principle of law contended for by the other litigant. The decision, however, can be predicted in the alternative, which is not the case with arbitral awards. In the case of judicial questions, nations can submit their disputes with full knowledge of the consequences, and agree or refuse to submit the particular dispute in the fullness of knowledge. Should the proposed tribunal justify the hopes and expectations of its partisans, and should the nations resort to it even with less frequency than individuals resort to national courts, it is evident that the habit to submit questions of a legal nature would be created; and if the court composed of permanent judges decided according to principles of law and of justice, its decisions would tend, like those of national courts, to develop the law which they profess to interpret. A line of precedents would be established, which the court would be forced to follow in like cases, just as do national courts; for international judges could not stultify themselves by refusing to accept a decision as binding, which they themselves had delivered. Precedent would thus be established, the continuity of international decisions introduced, and international law would be developed through judicial decisions just as clearly, as easily, and as certainly as the common law of England has been developed by a long line of trained judges acting under a sense of judicial responsibility.

Judicial decision can be predicted in alternative and would attract nations.

Results of successful operation of truly permanent court; creation of habit to resort to it; creation of precedents; development of law

It is not only the common law that the judges of England have interpreted and developed. International law is under deep and abiding obligations to the great Lord Stowell for a long line of decisions deal-

ing with many phases of the law of nations, particularly with questions of maritime law. The decisions of the American judges, Marshall and Story, are also classics of international law, and it has been estimated that some two thousand cases decided by the Supreme Court of the United States have involved, to a greater or lesser degree, principles of the law of nations. It may be further said by way of illustration, and as pointing out the consequences of judicial decision, that the constitutional law of the United States has been built up by carefully considered judgments of the Supreme Court, and that an international tribunal, composed of competent judges holding office for a long period of years, and possessing the confidence of nations, would render the same service to the nations at large as the Supreme Court has rendered to the states of the American Union. A system of international law would be developed to meet the needs of nations, and be given the symmetry of a code, just as the constitutional law of the United States has been developed by judicial decision, and been given the symmetry of a code.

Development of law by judicial decision.

As indicating the process by which this has been accomplished, a passage is quoted from a famous judgment of Lord Stowell in the domain of international law, whose decisions have been so influential in shaping and developing the law of prize. In the case of *The Atalanta,*[1] decided in 1808, that illustrious judge said:

> I am warranted to hold that it is an act which will affect the vehicle, without any fear of incurring the imputation, which is sometimes strangely cast upon this court, that it is guilty of interpolations in the laws of nations. If the court took upon itself to assume principles in themselves novel, it might justly incur such an imputation; but to apply established principles to new cases, can not surely be so considered. All law is resolvable into general principles: The cases which may arise under new combinations of circumstances, leading to an extended application of principles, ancient and recognized, by just corollaries, may be infinite; but so long as the continuity of the original and established principles is preserved pure and unbroken, the practice is not new, nor is it justly chargeable with being an innovation on the ancient law when, in fact, the court does nothing more than apply old principles to new circumstances.[2]

Decision of proposed court binds parties to its creation, although not parties to suit

In the next place, the judgment of an international court would bind, not merely the parties to the particular dispute, but also the nations which were parties to its creation. If it were truly international,

[1] 6 C. Robinson's Reports, 440.
[2] *Ibid.,* 458.

in the sense that the court was the creature of all members of the society of nations, its decisions would bind all its members. If composed of a lesser number, it would bind that number, however large or small.

In thus stating boldly and without argument that the decisions of a permanent court of the kind proposed would bind not only the litigating nations, but also the powers which are parties to its creation, the undersigned is well aware that, stated as a general principle, this contention is subject to criticism. But he believes that, in fact if not in theory, the inevitable consequence of the successful operation of the court would be as stated. It is true that decisions of courts other than those of Great Britain and the United States are not looked upon as precedents in the sense that they are binding upon courts when passing upon subsequent cases of a like nature. But the authority of the adjudged case is nevertheless very persuasive, and, as will be shown later in a passage quoted from Professor Wambaugh, the tendency of all courts is, whether they administer the principles of civil or common law, to follow carefully considered judgments. Again, it is true that the judgment of a court only binds the parties to it, and that other persons may bring a suit of a similar nature in the hope of obtaining a different judgment. But if the court be composed of the same judges, and if the previous case has been carefully argued and considered, it is clear that the inevitable tendency is to follow the decision in the other case; for if the judges did not do so, they would seem to tax themselves with carelessness in the former case, or partiality in the present one. It follows therefore that although the judgment directly binds only the individual litigants, it nevertheless indirectly binds all others in like circumstances. Lest this effect of a judgment should seem to be confined to private law and to private parties and not to be applicable to public law and to states as such, the undersigned refers to the many decisions of the Supreme Court of the United States, in which individual states of the American Union have been parties. It may be objected that these states are not sovereign, and that analogies drawn from them are therefore inapplicable to the members of the society of nations. It is a fact, however, that the states are frequently referred to as sovereign in the reports of the Supreme Court; that as sovereign states, they can not be sued without their consent;[1] that execution can

[1] In the case of Beers v. Arkansas (20 Howard, 527), decided by the Supreme Court in 1857, Mr Chief Justice Taney said, and applied the principle of law to the State of Arkansas: "It is an established principle of jurisprudence in all civilized nations that the sovereign can not be sued in its own courts, or in any other, without its consent and permission"

not be issued against them;[1] that the Supreme Court regards itself when passing upon controversies between them as an international court;[2] and that international law is followed where applicable.[3] Perhaps the term "quasi-sovereign" is more accurate,[4] but for present purposes the nomenclature is immaterial, as the states can only be sued by one another by virtue of general consent given in the Constitution, not by citizens or subjects as such, and the judgment in a suit between states is not executed by force, but compliance with it depends solely upon the good faith of the states, as in the case of independent nations.[5] As in the case of individuals, the judgment merely binds the parties to the record, but, again, as in the case of individuals, the decisions are followed in like cases, so that, in fact if not in theory, the judgment affects the forty-eight states of the American Union because each state knows that the law declared in one case will be applied in another of a like nature. It is believed, therefore, that nations parties to a judicial union would inevitably be bound by the judgments of the court of the union, even although there were no positive provision to this effect in the convention creating it.

The difference between a temporary tribunal, organized for a special

[1] In the extradition of an alleged criminal who had taken refuge in Ohio, it was held by Chief Justice Taney, speaking for a unanimous court, that it was the duty of the Governor of the State to extradite a criminal, "but if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either through the Judicial Department or any other department, to use any coercive means to compel him" Kentucky v Dennison, 24 Howard, 66

[2] In Virginia v. West Virginia, decided by the Supreme Court in 1911 (220 United States Reports, 1), Mr. Justice Holmes, delivering the unanimous opinion of the court, said that "the case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that can not be dealt with by Congress or disposed of by the legislature of either state alone"

[3] In Virginia v. Tennessee (148 United States Reports, p 503), the court decided the controversy between the states according to the doctrine of prescription laid down by Vattel: "The tranquillity of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title" VATTEL, *Law of Nations,* book ii, c. 11, sec 149.

[4] In Georgia v. The Tennessee Copper Company, decided in 1907, Mr Justice Holmes said: "This is a suit by a State for an injury to it in its capacity as quasi-sovereign" 206 United States Reports, 230

[5] It is common knowledge that the State of Georgia refused to obey the judgment of the Supreme Court in the case of the Cherokee Nation v State of Georgia (1831, 5 Peters, 1); that President Jackson declined to support the court's decision to the same effect in Worcester v. Georgia (6 Peters, 521), saying: "John Marshall has made his decision; now let him enforce it!"

purpose and binding two nations in controversy, and a court composed of many nations, whose decision binds each and all in a like or similar case, is thus evident. The decision of the permanent court would declare the law for all the states which had coöperated in its establishment. Each state would thus have an interest in the appointment of competent judges, because the judgment would affect them in a like case, just as if they were parties to the dispute. The principle underlying the decision would by the action of the court become the law of all the countries constituting the tribunal, just as a decision of the Supreme Court of the United States binds each of the states of the American Union. In consenting to the Constitution, the original thirteen states agreed to be bound by its provisions, and each state subsequently admitted to the Union agrees to be bound by the provisions of the Constitution.

Objection that proposed court would legislate refuted by action of Great Britain towards Article 7 of Prize Court Convention

It may be said that such a court would be in effect a legislature, and that it would create the law as well as interpret it. It can not be denied that a court does make law, and it is believed that judge-made law is equal to, if not superior to, statutory law. It is, however, not necessary that the international court should be invested with the functions of a legislature because the parties can, in submitting the case, prescribe the principles of law to be applied, if such principles exist, and if they do not exist, they can create them, as Great Britain and the United States did in the case of the Three Rules of Washington contained in the Treaty of Washington of 1871, for the settlement of the *Alabama* cases. That is to say, the nations in controversy may determine the principles of law to be applied in advance of the decision, and if those principles commend themselves to the other nations, they become embodied in international law; or the nations may, by general agreement, determine the principles of law to be applied by the court in those branches of international law which may be regarded as not sufficiently clear, or not so generally recognized as to supply the court with the principles of law which it is to administer. A striking example of this is furnished by the action of the powers in regard to the Prize Court Convention adopted by the Second Peace Conference. Article 7 of this very important document provides that:

> If a question of law to be decided is covered by a treaty in force between the belligerent captor and a power which is itself or whose subject or citizen is a party to the proceedings, the court is governed by the provisions of the said treaty.
>
> In the absence of such provisions, the court shall apply the rules of international law. If no generally recognized rule exists, the

court shall give judgment in accordance with the general principles of justice and equity.[1]

This article deals with three different and important situations. In the first place, if a question of law is covered by a treaty between the two countries, then the treaty is to be applied and interpreted by the court, as it is at once the origin and measure of the rights of the contending parties. In the next place, if there is no such treaty or convention, the court is to apply the rules of international law; but it frequently happens that a rule of law is claimed by one nation or group of nations to exist and to be controlling, whereas another nation or group of nations maintains with equal earnestness that a different rule of law exists and applies. As an example of this, the difference of opinion concerning the law of blockade may be cited. Continental practice differs in certain important particulars from Anglo-American practice, and the advocates of each theory maintain that their conceptions are in accordance with international law. Now, if the Prize Court, when established, were called upon to decide a question involving blockade, it is evident that the court would be forced to adopt one or the other contention, for, as they are inconsistent, both could not be adopted. The difficulty is not remedied by the statement that if no generally recognized rule exists, the court shall judge according to the general principles of justice and equity, because the contending nations have their own views as to justice and equity, and they might and probably would be unwilling to allow the tribunal to decide these questions for them, as they might be considered by the powers as of vital importance. Therefore, Great Britain refused to ratify the Prize Court Convention and to become a party to the Prize Court unless an agreement were reached in advance upon certain branches of prize law which the court might be called upon to interpret and apply, as, to quote the exact language of the British Government, "it would be difficult, if not impossible, for His Majesty's Government to carry the legislation necessary to give effect to the convention unless they could assure both Houses of the British Parliament that some more definite understanding had been reached as to the rules by which the new tribunal would be governed." The result

[1] Si la question de droit à résoudre est prévue par une Convention en vigueur entre le belligérent capteur et la Puissance qui est elle-même partie du litige, la Cour se conforme aux stipulations de ladite Convention

A défaut de telles stipulations, la Cour applique les règles du droit international. Si des règles généralement reconnues n'existent pas, la Cour statue d'après les principes généraux de la jurisprudence et de l'équité.

was that Great Britain called a conference of some ten maritime powers to consider the subjects embraced in the call, in the hope that, through discussion and concession, an agreement might be reached upon them. The Conference met at London on December 4, 1908, and adopted, on February 26, 1909, the so-called Declaration of London, which codified certain branches of prize law in such a way that the court, instead of deciding according to the general principles of justice and equity, as authorized by Article 7 of the Convention, would be obliged to determine the controversy, in as far as the Declaration of London applied, according to the letter and spirit of the principles of law authoritatively laid down by the contracting powers. It is therefore evident that the legislative action of the court can be controlled by special or general agreement, even although the decisions of the court would, in interpreting and applying recognized principles, develop international law, just as the Supreme Court of the United States has by its decisions interpreted the Constitution of the United States in such a way as to create a compact and adequate body of law for the forty-eight states of the American Union.

The relative authority of treatises and precedents in Anglo-American and in other courts.

There is another question which should be discussed in this connection, as it may be the cause of misunderstanding if not clearly understood. It is frequently said that Anglo-American courts of justice follow judicial precedents and regard themselves as bound by them, whereas courts administering other systems of law are not bound by previous decisions, and each question is decided, or at least can be decided, when and as it arises, without reference to previous judgments of coördinate courts, or, indeed of superior tribunals. It is also said that Anglo-American courts either reject or consider as inferior to adjudicated cases the writings of the learned, whereas foreign courts regard such writings as sources of law, and as binding upon them, at least to a certain extent. The question therefore presents itself: if an international court adopted the Anglo-American method, would its action be acceptable to other nations; or if, on the contrary, the international court should adopt what may be called the foreign method, would not Great Britain and the United States object to this method of procedure? The subject is important, but the difficulty is more specious than real, as the following observations will, it is hoped, tend to show.

Admitting for the moment the importance of the question, it may be said, however, that the matter has no present importance, because precedents of mixed commissions and of temporary tribunals are rarely cited in books of authority or regarded as binding by subsequent com-

missions or tribunals. They may, therefore, be excluded from consideration. In the next place, it is pretty generally admitted that the sources of international law are custom, as evidenced by the practice of nations, and treaties and conventions. Now custom and the practice of nations are to be found in the writings of the learned, in treatises and monographs on international law. Treaties and conventions bind the nations contracting them, and are to be found in official publications. It appears, therefore, that, for the present at least, the international tribunal could not be bound by decisions of mixed commissions and of temporary tribunals, for these do not have authority, and that the judges of the proposed court would of necessity have to resort to treatises on international law, because it is primarily in treatises that the practice of nations is to be found, and to official collections of treaties and conventions, in so far as treaties and conventions are the subject of dispute or enunciate principles of law. It is believed, therefore, that as far as the international court is concerned, the alleged conflict between the relative value of treatises and of decisions of courts is academic. But it is proper to give a direct answer to the questions propounded. This will be done in the language of Professor Wambaugh, who has devoted much care and attention to this subject. He says:

> The question may well be asked whether on the continent of Europe, and in other countries using systems descending from the Roman law, there is not a view rejecting decisions as creators or even demonstrators of law, and whether in consequence it must not happen that the decisions of international courts will not be recognized as authoritative sources of legal doctrine. To such a question two answers can be given. One is that in the nature of things the force of judicial decisions must be great, for the reasons already pointed out. The other answer is that, whatever the theory of continental and other jurists may be, their actual practice as to this matter is substantially the same as the practice of the lawyers of England and America. The libraries of lawyers in Roman law countries are crowded with reports of adjudged cases, and these volumes are referred to by lawyers and judges there in much the same way as similar volumes are used in England and America. It is of little practical consequence that in Roman law countries the theory is that each case is decided upon the basis of the court's new and untrammeled opinion as to the rights of the parties, and not at all upon the basis of a doctrine that the earlier opinions of other courts, or at least of this very court, should now be followed, whereas in England and America and other common law countries the theory—briefly called *stare decisis*—is that past decisions are authoritative. The result is the same,

and always must be the same, namely, that the reasoned decisions of skilled courts command respect, win approval, and develop law.[1]

There are certain other advantages which a permanent tribunal possesses over the temporary variety, but although important, they would not of themselves, it is believed, justify the creation of an international court were other and weightier reasons lacking. They will therefore be but briefly mentioned.

Proceedings before proposed court shorter than before temporary tribunals.

The first is the greater dispatch in the settlement of a case tried before a permanent court, because the judges are judges by profession, accustomed to the details and intricacies of judicial procedure and familiar with the conduct of cases. The procedure is thus an aid rather than a hindrance, and enables the judges to reach a decision without sacrificing substance to form, or without wasting time in mastering the details of procedure with which they are either familiar, or which their training enables them to comprehend and control with comparative ease.

In the next place, the question of language should be considered, because it needs no argument that judge and counsel should be on speaking terms.

Advantage of knowing language to be used in court.

If the court exists, its composition is known in advance, as are also the linguistic qualifications of its members. The litigants can thus and in advance of the *compromis* easily determine the question of language, because it will depend in no slight measure upon the composition of the court, even although it should have adopted a language or languages to be used before it. The *amour propre* of the litigants may easily be saved by providing that their agents and counsel are free to use their respective languages; but if those languages are not likely to be understood by the court as a whole, it is evident that no use will be made of this privilege, and that the nations will select agents and counsel familiar with the language believed to be preferred by the court, or which may have been prescribed by it. The existence of a permanent body of judges, preferring a certain language or languages, even although the use of a language or languages be not made a rule of court, would greatly facilitate the submission of the case, because in the negotiations preceding the submission, nations have to decide the language to be used and to find judges who understand it. This difficulty would be overcome, and the agreement of the parties thus facilitated. In this connection it may be proper to add that if it be under-

[1] *Proceedings of the American Society for Judicial Settlement of International Disputes,* 1910, p 144.

stood that one particular language is preferred to all others, and that this language is actually used in the trial of cases, there would be an inducement to lawyers, hoping to practice before the court, to familiarize themselves with that language, and there would thus be indirectly an incentive to the creation of an international bar.

Costs of proposed court borne by contracting parties and hence small for any one state.

Finally, the question of costs should be considered, for one of the objections to the present system is not merely that the submission of a case is time-consuming; that the composition of the temporary tribunal is difficult and often unsatisfactory, as tested by the result, but that the court expenses as such to be borne by the litigating nations in equal parts are often so considerable as to deter or to discourage them from resorting to arbitration. The traveling expenses of the judges and *honoraria* agreed upon between the parties must be paid. These sums naturally vary with the circumstances of the case, and it may be said in passing that the exorbitant *honoraria* exacted by the arbiters in the North Atlantic Fisheries Arbitration would seem to suggest that, however desirable arbitration is in theory, it may be in practice a luxury only to be enjoyed by wealthy nations. In the case referred to, each of the five arbiters received, besides his traveling and other expenses, the sum of £3,000 sterling. That is to say, each arbiter received for some three months' actual service at The Hague more than the annual salary of the Chief Justice of the United States. In case of a permanent court to which all or a number of nations are parties, the traveling expenses, the salaries of the judges, and all other outlays which could properly be called court expenses would be borne by the contracting states, with the result that the quota to be paid by any one state would be modest, and the amount would be trifling if the number of contracting states were large.

Summary of advantages of proposed court.

In a word, the decision of a case by a permanent court composed of professional judges would be judicial; it would form a precedent and tend to develop international law; it would bind not merely the individual litigants, but all nations participating in its creation; it would be speedy; and, last but not least, it would be cheap; and justice to be popular should be cheap.

Steps taken by Hague Peace Conferences to create permanent court.

Let us now pass to the steps taken by the Hague Conferences to create a permanent international court.

It would be interesting and instructive to state in detail the projects which have been proposed from time to time to establish an international tribunal, but it is feared that such information would be irrelevant to the present purpose. Suffice it, therefore, to say that the experience had with arbitration in the decades following the Jay treaty

of 1794 suggested the usefulness of a uniform procedure in the trial of international disputes, and the desirability of some kind of an international court, in which the nations could try the conflicts of a legal nature which might arise between and among them.

Code of arbitral procedure drafted by Institute of International Law.

The Institute of International Law, organized in 1873, drafted within a year of its organization a code of arbitral procedure, which, subsequently amended, served as the basis of discussion on this subject at the First Hague Conference, and which, with sundry changes, not always for the better, was adopted by that august assembly. The Interparliamentary Union, created by the wit and ingenuity of an English workman, the late Sir Randal Cremer, whose bust was formally unveiled last August by Mr. Andrew Carnegie and appropriately placed in the Peace Palace at The Hague upon its formal opening, recognized the services which a court of arbitration could render, and, at its session of 1894, at The Hague—a name of good augury in matters international—voted the following resolutions:

Recommendation of Interparliamentary Union of permanent court at the Hague session

1. National sovereignty remains inalienable and inviolate;
2. Adherence by any government to the creation of a permanent international court must be entirely voluntary;
3. All adhering states must be on a footing of perfect equality before the permanent international court;
4. The decision of the permanent court must have the force of decisions, subject to execution.[1]

The next year, at the Brussels session, a project based upon these resolutions was adopted by the Interparliamentary Union, which project, like the draft of the Institute of International Law on arbitral procedure, served as the basis of discussion at the First Hague Peace Conference, where it was accepted in principle, adopted with many modifications, and rendered effective.

Action of First Hague Peace Conference

The First Peace Conference, to which reference has just been made, declared, among other things, that the object of international arbitration is "the settlement of differences between states by judges of their own choice, and on the basis of respect for law"[2] (Article 15); that arbi-

[1] 1° La souveraineté nationale demeure inaliénable et inviolable;
2° L'adhésion de tout Gouvernement à la constitution d'une Cour permanente internationale est purement facultative;
3° Tous les Etats adhérents doivent être sur un pied de parfaite égalité devant la Cour permanente internationale;
4° Les jugements de la Cour permanente doivent avoir la force d'une sentence exécutoire LANGE, *Union interparlementaire· Résolutions des Conférences,* etc., 2d ed 1911, p. 50.

[2] L'arbitrage international a pour objet le règlement de litiges entre les Etats par des juges de leur choix et sur la base du respect du droit (Article 15.)

tration was the most effective and at the same time the most equitable means of settling disputes of a legal nature or involving the interpretation or application of international conventions which diplomacy had failed to adjust (Article 16); that to facilitate the immediate recourse to arbitration in differences which diplomacy had failed to settle, a permanent court of arbitration, accessible at all times, should be established (Article 20); that each signatory of the convention should select for a period of six years "four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrators" [1] (Article 23); that the judges to form a temporary or special tribunal should be chosen from the list of competent persons appointed by the signatory states (Article 24); that an international bureau, under the supervision of the Administrative Council, composed of the diplomatic representatives at The Hague, should be established as a record office for the court (Article 22); and that in the trial of a case the procedure drafted by the Conference should be used, unless modified by the litigating parties (Article 20).

So-called Permanent Court of Arbitration is a list not a court.

The nature of the institution thus recommended, which was later created by the nations, will become evident from a comparatively brief analysis of these various provisions. No permanent tribunal was created. A list of appropriate persons was furnished by the signatories, and from this list the nations were recommended to select the members of a special tribunal to try a particular controversy. The judges are, in a double sense of the word, the choice of the parties, because, in the first place, each nation possesses the right to appoint not more than four competent persons for the period of six years, and the individual litigants possess the right to choose from this list the persons whom they may desire to have pass upon the controversy. The method of selection was as follows: failing a direct agreement upon the personnel of the court, each nation in controversy chose two persons from the list, and these two selected the umpire. The tribunal thus created came into being for the trial of the case, and with its determination, passed out of existence, after having settled the controversy "on the basis of respect for law," according to the wording of Article 15. But it is evident that the expression "on the basis of respect for law" is not necessarily synonymous with the application of the

[1] . . . Quatre personnes au plus, d'une compétence reconnue dans les questions de droit international, jouissant de la plus haute considération morale et disposées à accepter les fonctions d'arbitres. (Article 23)

principles of law, and that the door was thus open to compromise, because arbiters may respect law without following it.

The purpose of the framers of this important convention was to organize a permanent court of arbitration accessible at all times. At the Second Peace Conference, an American delegate said:

> In a word, the Permanent Court is not permanent, because it is not composed of permanent judges; it is not accessible, because it has to be formed for each individual case; finally, it is not a court, because it is not composed of judges.[1]

The late Mr. Asser, who contributed so effectively to the establishment of the so-called Permanent Court at the First Conference, said:

> Instead of a Permanent Court, the Convention of 1899 only created the phantom of a court, an impalpable ghost, or, to speak more plainly, it created a clerk's office with a list.[2]

And, finally, Mr. de Martens, who had likewise championed the so-called Permanent Court of Arbitration at the First Conference, felt justified at the Second in asking and answering the following question:

> What, then, is this court whose judges do not even know each other? The Court of 1899 is only an idea which sometimes takes the form of body and soul and then disappears again.[3]

It is not denied that the recognition by the Conference of the efficacy of arbitration was a great and important event; that the creation of machinery from which a temporary tribunal could be formed was a step in advance; and that the drafting of a code of procedure was of great service to the nation because in times of tension, nations, like individuals, are not in the frame of mind to agree upon rules of procedure for the conduct of the case which one or perhaps both of them may not wish to try. But it is evident that the most that the First

[1] En un mot, la cour permanente n'est pas permanente, puisqu'elle n'est pas composée de juges permanents; elle n'est pas accessible, puisqu'elle a besoin d'être constituée pour chaque cas particulier; enfin ce n'est pas une cour, puisqu'elle n'est pas composée de juges Address of Mr Scott, *Deuxième Conférence de la Paix, 1907, Actes et documents,* vol ii, p. 315

[2] Au lieu d'une Cour permanente la Convention de 1899 ne donna que le fantôme d'une Cour, un spectre impalpable ou pour parler plus nettement, elle donna un greffe avec une liste. *Ibid.,* p. 235

[3] Quelle est donc cette Cour dont les membres ne se connaissent même pas? La Cour de 1899 n'est qu'une idée, qui quelquefois prend corps et âme, et puis disparait de nouveau. *Ibid.,* p. 322.

Conference did towards the creation of a permanent court was to provide a list from which a temporary tribunal could be constituted and to familiarize the world with the idea of a permanent tribunal by calling the panel a Permanent Court of Arbitration.

The proposed court is not a new project but a recommendation of the Second Hague Peace Conference

At the Second Peace Conference, held at The Hague in 1907, the American delegation, in pursuance of instructions from Mr. Root, then Secretary of State of the United States, proposed the establishment of a truly permanent court composed of professional judges. Germany and Great Britain joined in the proposal, and although not technically a party to the project, the French delegation worked loyally for its realization. The result was the adoption, after weeks of discussion and debate, of a draft convention of thirty-five articles dealing with the organization, jurisdiction, and procedure of the so-called Court of Arbitral Justice, and a recommendation to the powers to secure its establishment after the adjournment of the Conference through diplomatic channels. That is to say, the largest and most representative of diplomatic conferences approved the principle of a permanent court and recommended its establishment through diplomatic channels by the appointment of permanent judges, or rather of judges appointed for a period of twelve years. The result was thus a very great triumph, but, at the same time, it was not complete, because the Conference was unable to hit upon a method of appointing the judges, some fifteen in number, satisfactory to all of the powers represented at the Conference. Various methods were suggested, but none was found generally acceptable, a fact due to the difficulty of the subject, the point of approach, and the lack of time, because the Conference, burdened with many matters, was in session only four months.

Acceptance of the court by Germany, Great Britain, the United States

The powers chiefly concerned in the introduction of the proposal for the court and its establishment by the Conference intimated, both then and subsequently, their willingness to constitute the tribunal diplomatically. For example, in the official report on the Second Hague Conference, issued by the German Government shortly after the adjournment of the Conference, Germany stated its readiness to coöperate in its establishment in the following measured language:

Acceptance of Germany.

> The organization of such an arbitral court was proposed at the Conference by the United States of America. The proposal sought, as far as possible, to facilitate arbitration, and for that purpose to create a permanent universal court of justice composed in a definite manner, which should meet each year at The Hague, in order to decide, free of cost, all controversies submitted to it by the contracting powers. Such an organization appeared

> to be a thoroughly appropriate step, which met also the purposes which Germany sought to attain. The German delegation therefore earnestly supported the proposal, and in coöperation with the American and British delegation drafted and submitted an adequate proposition to the Conference. The proposal did not, however, lead to the conclusion of a treaty for the reason that the members of the Conference could not agree upon the manner of composing the court of justice. But, in accordance with the first *vœu* contained in the Final Act, the Conference recommended the powers to accept the draft based upon the proposal referred to, as soon as an agreement could be reached in regard to an appropriate composition of the court. Germany stands ready *to coöperate* in the establishment of the court.[1]

Acceptance of France.

After a sympathetic account of the proposed court, of the services it would render, and of the proceedings of the Conference in regard to it, and expressing the hope that the court would be shortly established, the French delegation, in its official report, insists upon the duty of the various states to carry to completion the work begun at The Hague. Thus:

> Each of the states must exert special efforts to carry out, as far as possible, the *vœux,* resolutions or recommendations, by which the Conference, in matters upon which it could not reach a conclusion, has emphatically signified its desire to see the governments complete its work. It will suffice to refer to the negotiations requisite to give definitive form to the permanent Court of Arbitral Justice, whose operation depends upon an agreement regarding the manner of selecting the judges.[2]

[1] Die Errichtung eines solchen Schiedsgerichtshofs war von den Vereinigten Staaten von Amerika auf der Konferenz angeregt worden. Die Anregung bezweckte die möglichste Erleichterung der Schiedssprechung, indem ein ständiger, in bestimmter Weise zusammengesetzter Weltgerichtshof jahrlich im Haag zusammentreten sollte um alle ihm von den Vertragsmächten unterbreiteten Streitigkeiten kostenlos zu entscheiden. Eine solche Einrichtung erschien als ein durchaus zweckmässiger Schritt, der auch den von Deutschland angestrebten Zielen entsprach Die Deutsche Delegation hat daher diese Anregung lebhaft unterstützt und eine entsprechende Vorlage gemeinsam mit der Amerikanischen und der Britischen Delegation ausgearbeitet und eingebracht. Zum Abschluss eines Vertrages hat die Vorlage auf der Konferenz nicht geführt, weil man sich dort über die Zusammensetzung des Gerichtshofs nicht einigen konnte Die Konferenz hat aber mit dem in der Schlussakte von ihr geäusserten ersten Wunsche den Mächten empfohlen, den auf der erwähnten Vorlage beruhenden Entwurf anzunehmen, sobald eine Verständigung über eine geeignete Organisation herbeigeführt sein würde. Deutschland ist gern bereit, seine *Mitwirkung* hierzu eintreten zu lassen. *Denkschrift über die zweite Internationale Friedenskonferenz,* p 3

[2] Chacun d'eux doit veiller à ce qu'une suite soit donnée, dans la mesure possible, aux vœux, résolutions ou recommandations, par lesquels la Conférence, là où elle ne pouvait conclure elle-même, a marqué nettement son désir de voir les gouvernements achever son œuvre Il nous suffira de citer les négociations

Acceptance of Great Britain.

The official report of the British delegation voices its regret that the Arbitral Court was not constituted at The Hague and expresses the hope that it may be instituted. "We can not but hope," it is said, "that the difficulties which we have been unable to overcome may in the end be surmounted, and that our labor as pioneers may in the end not prove entirely fruitless." [1]

Acceptance of the United States.

For the sake of completeness rather than for any doubt as to the attitude of the United States, a paragraph is quoted from the official report of the American delegation. After briefly explaining the nature and importance of the proposed court, the report proceeds:

> It is evident that the foundations of a permanent court have been broadly and firmly laid; that the organization, jurisdiction, and procedure have been drafted and recommended in the form of a code which the powers or any number of them may accept, and by agreeing upon the appointment of judges, call into being a court at once permanent and international. A little time, a little patience, and the great work is accomplished.[2]

In his annual message to Congress, following the adjournment of the Conference, Mr. Roosevelt, then President of the United States, said:

> Substantial progress was also made towards the creation of a permanent judicial tribunal for the determination of international causes. There was very full discussion of the proposal for such a court and a general agreement was finally reached in favor of its creation. The Conference recommended to the signatory Powers the adoption of a draft upon which it agreed for the organization of the court, leaving to be determined only the method by which the judges should be selected. This remaining unsettled question is plainly one which time and good temper will solve.[3]

Purpose of this memorandum is to urge establishment of court for limited number of powers

It is not the purpose of the present memorandum to discuss the draft convention in detail, because it was adopted by the Conference, and is included in the official report of its proceedings issued by the Netherland Government. Nor is it thought advisable in this connection to

nécessaires pour donner définitivement l'existence à la Cour de Justice arbitrale permanente, dont le fonctionnement est subordonné à une entente sur le choix des juges. *Ministère des Affaires étrangères Documents diplomatiques. Deuxième Conférence internationale de la paix, 1907, Paris, Imprimerie Nationale,* p. 116

[1] *Correspondence respecting the Second Peace Conference held at The Hague in 1907,* p. 20.

[2] *Foreign Relations of the United States,* 1907, pt 2, p. 1178.

[3] *Ibid.,* pt. 1, p. lxiii.

enumerate the different methods proposed for the appointment of judges. The purpose of this memorandum is not to advocate the establishment of the Court of Arbitral Justice for all nations, but for a limited number of nations that may care to constitute it. It is, however, proper to make some observations of a general nature to show why the court was not established.

Reasons why court was not created by Second Hague Peace Conference.

One reason for the failure of the Conference to agree upon a satisfactory method of appointing the judges was that the question of establishing the court was not discussed in advance of its meeting; that the project presented in the first instance by the United States was one with which the delegates of other countries were not familiar, and about which they had no instructions; and delegates to a diplomatic conference act only upon instructions from their home governments. Another reason which has been suggested was the difficulty of the subject. It was also a mathematical difficulty. If each nation could have appointed a judge, the matter would have been simple; but we would then have had a judicial assembly of forty-four members, not a court of a restricted number of judges. Perhaps it would have been possible to reach an agreement, if the nations as such were not to have been represented in the tribunal; that is to say, if, instead of representing the nations, it had been proposed in the beginning to select some fifteen persons possessing the confidence of the society of nations and appointing them judges for a period of years to be determined upon. Be this as it may, the fact is that no generally acceptable method was proposed; the judges were not appointed, and the establishment of the court remains the hope of the future.

Recommendation of Conference.

It is, however, possible for any number of nations to agree through diplomatic channels to establish the court for themselves, in accordance with the language of the Final Act:

> The Conference recommends to the signatory powers the adoption of the annexed Draft Convention for the establishment of a Court of Arbitral Justice, and the bringing it into force as soon as an accord shall be reached upon the choice of the judges and the constitution of the court.[1]

Efforts of United States to secure establishment of court.

This language was not accidental: it was chosen in the belief that some nations—it was hoped that many, if not all—might be willing to constitute the court through diplomatic channels; and since the ad-

[1] La Conférence recommande aux Puissances signataires l'adoption du projet ci-annexé de Convention pour l'établissement d'une Cour de Justice arbitrale, et sa mise en vigueur dès qu'un accord sera intervenu sur le choix des juges et la constitution de la Cour.

journment of the Conference more than one attempt has been made by the United States to establish the court. Thus, on February 6, 1909, Mr. Robert Bacon, then Secretary of State of the United States, instructed the American delegation to the London Naval Conference to propose that the Prize Court should be invested with the jurisdiction of the Court of Arbitral Justice, and that, in this capacity, it should act in accordance with the Draft Convention of the Arbitral Court. As this was the first attempt made by the United States to secure the establishment of the proposed court, the material portion of Mr. Bacon's instructions is quoted:

Secretary Bacon's proposals.

> In order to confer upon the Prize Court the functions of an arbitral court contemplated in the first recommendation of the Final Act of the Second Conference, the Department proposes the following article additional to the draft protocol concerning the Prize Court:
>
> And any signatory of the Convention for the establishment of the Prize Court may provide further in the act or ratification thereof that the International Court of Prize shall be competent to accept jurisdiction of and decide any case, arising between the signatories of this proposed article, submitted to it for arbitration, and the International Prize Court shall thereupon accept jurisdiction and adopt for its consideration and decision of the case the Draft Convention for the establishment of a Court of Arbitral Justice adopted by the Second Hague Conference, the establishment of which was recommended by the powers through diplomatic channels.
>
> Any signatory of the Convention for the establishment of the International Court of Prize may include in its ratification thereof the proposed article and become entitled to the benefits thereof.

Mr. Bacon hoped that the powers participating in the Naval Conference, namely, Germany, the United States, Austria-Hungary, Spain, France, Great Britain, Italy, Japan, the Netherlands and Russia, might be willing to enlarge the functions of the Prize Court in the way suggested, and thus at one and the same time secure the establishment of both tribunals.

The Conference, however, felt that the proposal to modify the Prize Court by conferring upon it the jurisdiction of the Court of Arbitral Justice, exceeded its powers. It therefore took no action upon the proposal to invest the Prize Court with the nature and functions of a Court of Arbitral Justice.

Deeming it possible to enlarge the functions of the Prize Court by engrafting upon it the jurisdiction of a Court of Arbitral Justice, and

acting in accordance with the letter and spirit of the recommendation of the Second Conference to constitute the Arbitral Court through diplomatic channels, Mr. Bacon, on March 5, 1909, sent a cable to Ambassador Reid informing him that the Department would shortly address a note to the powers on the subject, and directing him at the same time to communicate its substance to the American ambassador or minister of each of the powers represented at the London Naval Conference. As this act of Mr. Bacon was the second attempt of the United States to constitute the Court of Arbitral Justice, the material portion of this important cable is quoted:

> You will again convey to Sir Edward Grey this Government's high appreciation of his attitude toward investing the Prize Court with jurisdiction of Court of Arbitral Justice, as well as of his coöperation by means of which the Conference adopted a *vœu* recommending to the participating powers that a rehearing *de novo* of a cause before the Prize Court be permitted, instead of subjecting national decisions to review on appeal.
>
> You will inform Sir Edward that this Government will, upon receipt of the texts of the Conference, send an identic circular note to each of the participating powers, setting forth at length the reasons which influence the United States to request a rehearing *de novo* of a question involved in a national prize decision, and the means whereby this change of procedure may be effected without interfering with the rights of governments or individuals under the Prize Court Convention.
>
> The note will also show the advisability of investing the Prize Court with the jurisdiction and functions of a Court of Arbitral Justice in order that international law may be administered and justice done in peace as well as in war by a permanent international tribunal; that this close connection between the two courts was contemplated by the framers of the Arbitral Court as appears from Article 16 of the draft convention by virtue of which the judges of the Arbitral Court might exercise the functions of judges in the Prize Court. The failure to constitute the Arbitral Court, although the method of appointing judges was substantially the same for both courts, renders this provision ineffective, but it is possible to carry out the intent of the proposers in this and to constitute Arbitral Court by investing Prize Court with functions of Arbitral Court and to prescribe the Draft Convention of Arbitral Court as code of procedure when so acting.
>
> It is not intention of this Government to use pressure of any kind to secure acceptance of its views, but the United States feels that the constitution of the Arbitral Court as branch or chamber of the Prize Court for nations voluntarily consenting thereto would not only enhance the dignity of the Prize Court, but by creating permanent court of arbitration would contribute in the greatest

possible manner to the cause of judicial and therefore peaceable settlement of international difficulties.

Secretary Knox's proposal.

On October 18, 1909, Mr. Bacon's successor, Mr. Philander C. Knox, sent an identical circular note, proposing, in accordance with Mr. Bacon's cable, to invest the Prize Court with the functions of a Court of Arbitral Justice.

As this note of Secretary Knox's was the basis of subsequent discussion, and resulted in an agreement of Germany, France, Great Britain, and the United States to adopt the method of the prize court in appointing the judges for the Court of Arbitral Justice, it is advisable to quote at length the material portions of the note relating to this subject. After relating the action taken by the Department of State upon the initiative of Secretary Bacon, Mr. Knox proceeded:

> A careful consideration of the project and of the difficulties preventing the constitution of the court, owing to the shortness of time at the disposal of the Conference, has led the Government of the United States to the conclusion that it is necessary in the interest of arbitration and the peaceful settlement of international disputes to take up the question of the establishment of the court as recommended by the recent Conference at The Hague and secure through diplomatic channels its institution.

Mr. Knox then stated the close connection between the Prize Court and the Court of Arbitral Justice, and after quoting Article 16 of the Arbitral Court Convention, providing that the members of the Arbitral Court could "also exercise the functions of judge and deputy judge in the International Prize Court" he thus continued:

> The reason which existed in 1907 and led to the formulation of the articles still continues. It has therefore occurred to the United States that the difficulty in the way of reaching an agreement upon the composition of the court would be obviated by giving practical effect to Article 16 by an international agreement by virtue of which the judges of the International Prize Court should be competent to sit as judges of the Court of Arbitral Justice for such nations as may freely consent thereto, and that when so sitting the judges of the International Prize Court shall entertain jurisdiction of any case of arbitration submitted by a signatory for their determination and decide the same in accordance with the procedure prescribed in the draft convention. In proposing to invest the International Prize Court with the jurisdiction and functions of the proposed Court of Arbitral Justice the United States is actuated by the desire to establish a court of arbitration permanently in session at The Hague for the peaceful

> solution of controversies arising in time of peace between the nations accepting and applying in their foreign relations the principles of an enlightened and progressive international law.

Mr. Knox next explained the advantages of enlarging what might be called an existing institution, rather than attempting to create a new one, and that it was in the present instance especially desirable to do so, inasmuch as the American proposal would not require any change in the Prize Court Convention. Thus, Mr. Knox said:

> It is a truism that it is easier to enlarge the jurisdiction of an existing institution than to call a new one into being, and as the judges and deputy judges of the International Prize Court must be thoroughly versed in international law and of the highest moral reputation, there can be no logical or inherent objection to enlarging their sphere of beneficent influence in vesting them with the quality of judges of the proposed Court of Arbitral Justice.
>
> The proposal of the United States does not involve the modification either of the letter or spirit of the draft convention, nor would it require a change in wording of any of its articles. It would, however, secure the establishment of the Court of Arbitral Justice as a chamber of the world's first international judiciary and thus complete through diplomatic channels the work of the Second Hague Conference by giving full effect to its first recommendation.

Before suggesting the draft of an agreement to invest the Prize Court with the jurisdiction of the Court of Arbitral Justice, Mr. Knox reminded the powers that it was usual in the United States for one and the same judge to administer different kinds of law. Thus, he said:

> In proposing this solution of the difficulty the United States is influenced by daily practice and procedure in its national courts of justice, where one and the same judge administers law and equity, admiralty and prize, which, under its system of procedure, are different systems of law.

Having thus stated the reasons which led the Department of State to take up the question of establishing the Court of Arbitral Justice, and the method by which this could, in his opinion, be done, Mr. Knox, speaking as Secretary of State of the United States, proposed:

> That in the instrument of ratification of the International Prize Court Convention, signed at The Hague, October 18, 1907, any of its signatories consenting to invest the International Prize Court with the powers of a Court of Arbitral Justice shall signify its assent thereto in the following form:

Whereas, It is highly desirable that the Court of Arbitral Justice, approved and recommended by the Second Hague Peace Conference, be established through diplomatic channels; and

Whereas, Investing the International Prize Court with the duties and functions of the proposed Court of Arbitral Justice would constitute for the consenting powers the said Court of Arbitral Justice, as recommended by the first *vœu* of the Final Act of the said Conference;

Therefore, The Government of . . . agrees that the International Court of Prize, established by the Convention signed at The Hague, October 18, 1907, and the judges thereof, shall be competent to entertain and decide any case of arbitration presented to it by a signatory of the International Court of Prize, and that when sitting as a Court of Arbitral Justice the said International Court of Prize shall conduct its proceedings in accordance with the Draft Convention for the establishment of a Court of Arbitral Justice, approved and recommended by the Second Hague Peace Conference on October 18, 1907.

Proposals of Germany, France, Great Britain

In their replies to this note, Great Britain, Germany, and France proposed a meeting of representatives at Paris to modify the Prize Court to meet certain objections suggested by the United States, and to consider whether the Court of Arbitral Justice could be composed, for a limited number of countries that might wish to establish it, by appointing the judges in accordance with the method found acceptable in the Prize Court, instead of investing this court with the jurisdiction of the Arbitral Court. This method secured a judge to Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan and Russia, during the life of the Prize Court Convention, and gave the other signatories of the convention a larger or smaller representation, conditioned upon their commercial interests. The United States accepted this proposal, and a commission composed of Mr. Kriege, representing Germany, the undersigned, representing the United States, Mr. Renault, representing France, and Mr. Crowe, representing Great Britain, met at Paris in March, 1910, to consider, among other things, the establishment of the Court of Arbitral Justice. Without going into details, it may be said that the method of appointing the judges of the Prize Court was adopted by the commission, and that the four powers agreed to take steps, after the constitution of the Prize Court, for the establishment of the Court of Arbitral Justice, provided eighteen powers, including therein the four powers specified, should agree to the establishment of the Court of Arbitral Justice, and adopted an additional convention, appended hereto, modifying in certain particulars the original Convention of the Court of Arbitral Justice. The principle,

Meeting of commission at Paris and The Hague in 1910

Recommendations of the commission

therefore, was accepted that the Court of Arbitral Justice could be created by a limited number of powers. The failure of Great Britain to ratify the Prize Court Convention blocks the way to the establishment of the Court of Arbitral Justice, and makes the additional convention therefore inoperative.

It was recognized by the representatives of the four powers at the Paris Conference of 1910, that the formation of the Court of Arbitral Justice for a limited number of powers would involve some slight changes in the draft convention adopted by the Second Peace Conference, and the representatives suggested such changes. (Appendix, No. 1, p. 91.) At a later meeting of the representatives of the same powers, held at The Hague in July, 1910, still further modifications were made and accepted by their respective governments. (Appendix, No. 2, p. 94.) The present proposal to constitute the court for nine powers and to open it, upon condition, to other powers, would likewise require some modification of the original text, and a draft of such an agreement, based upon the agreement of the four powers concluded at Paris and at The Hague, is appended to this memorandum. (Appendix, No. 3, p. 98.)

Suggestion of undersigned regarding jurisdiction of proposed court.

If it is thought desirable to make other changes than those strictly necessary to put the original draft into force, and to constitute the court for the nine contracting powers, the undersigned would venture the suggestion that Article 19 of the draft convention should be omitted.

This article provides in its first paragraph that the delegation of the court may frame the *compromis* if the parties agree to leave this to the court. There can be no valid objection to this provision, but the case is different with the remaining paragraphs which have been the subject of much discussion and of no little criticism. They are here quoted for the sake of clearness and completeness:

> It [the delegation] is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach an understanding through the diplomatic channel, in the case of—
>
> 1. A dispute covered by a general treaty of arbitration concluded or renewed after the present convention has come into force, providing for a *compromis* in all disputes, and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the delegation. Recourse cannot, however, be had to the court if the other party declares that in its opinion the dispute does not belong to the category of questions to be submitted to compulsory arbitration, unless the treaty of

arbitration confers upon the arbitration tribunal the power of deciding this preliminary question;

2. A dispute arising from contract debts claimed from one power by another power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.[1]

This article in its entirety might properly be omitted and replaced by a provision contained in the original American proposal, which, however, was not formally submitted to the Conference, but which has met with the approval of many competent authorities, notably, Professor Ernest Nys, who thus writes of it:

Professor Nys' approval and statement of the undersigned's proposal.

> An ingenious proposal was submitted to various members of the Second Hague Conference regarding the jurisdiction of the permanent judicial court which was to be established. According to this plan the court shall be competent to receive, consider and determine any claims or petitions from a sovereign state touching any difference of an international character with another sovereign state, provided that such difference is not political in character and does not involve the honor, independence and vital interests of any state. It shall not be competent concerning any petition or application from any person, natural or artificial, except a sovereign state. It shall not take any action on any petition or application which it is competent to receive, unless it shall be of the opinion that a justiciable case, and one which it is competent to entertain and decide and worthy of its consideration, has been brought before it, in which case it may in not less than thirty nor more than ninety days after the presentation of the petition invite the other sovereign state to appear and submit the matter to judicial determination by the court. It follows that it would be possible for a state to call another state to the bar and thus bring about a judicial presentation of the question. It is true that one danger exists which

[1] Elle [la Délégation] est également compétente, même si la demande est faite seulement par l'une des parties, après qu'un accord par voie diplomatique a été vainement essayé, quand il s'agit:

1° D'un différend rentrant dans un traité d'arbitrage général conclu ou renouvelé après la mise en vigueur de cette Convention et qui prévoit pour chaque différend un compromis, et n'exclut pour l'établissement de ce dernier, ni explicitement ni implicitement, la compétence de la délégation. Toutefois, le recours à la Cour n'a pas lieu si l'autre partie déclare qu'à son avis le différend n'appartient pas à la catégorie des questions à soumettre à un arbitrage obligatoire, à moins que le traité d'arbitrage ne confère au tribunal arbitral le pouvoir de décider cette question préalable;

2° D'un différend provement de dettes contractuelles réclamées à une Puissance par une autre Puissance comme dues à ses nationaux, et pour la solution duquel l'offre d'arbitrage a été acceptée. Cette disposition n'est pas applicable si l'acceptation a été subordonnée à la condition que le compromis soit établi selon un autre mode.

must be avoided: that of wounding the pride of a sovereign state. However, the following provision obviates the difficulty: should the court invite a state to appear and submit the matter to judicial determination, the state so invited may (*a*) refuse to submit the matter; (*b*) refrain from submitting the matter by failing for a certain number of days to make any response to the invitation, in which event it shall be deemed to have refused; (*c*) submit the matter in whole, or (*d*) offer to submit the matter in part or in different form from that stated in the petition, in which event the petitioning state shall be free either to accept the qualified submission or to withdraw its petition or application; (*e*) appear for the sole purpose of denying the right of the petitioning state to any redress or relief; in case the court does not sustain this, it shall renew the invitation to appear. In case the states in controversy can not agree upon the form and scope of the submission of the difference referred to in the petition, the court may appoint, upon the request of either party, a committee of three from the Administrative Council, and this committee shall frame the questions to be submitted and the scope of the inquiry, and thereafter if either party shall withdraw, it shall be deemed to have refused to submit the matter involved to judicial determination. If such a procedure could be decided upon, all the difficulties which beset the path of arbitration would be overcome. The court of justice would be ready to hear the lawyers and representatives of the states, parties to the cause, and it could act in its capacity as a judicial tribunal and arbitration would be superfluous. There would be no longer necessity for general arbitration conventions, nor special *compromis* concluded with regard to a particular dispute; all states would be in the presence of a truly international tribunal and in the position of the citizen of a civilized country who, having an injury done to his rights, may cite him whom he accuses to have been the author of the wrong to meet him before established tribunals.[1]

Comment on proposal.

It is believed that the nine powers might be willing to allow themselves to be invited to—not summoned before—the Court of Arbitral Justice upon the initiative of one of the contracting powers, provided it was distinctly understood, and so expressed in the convention, that the invitation might be refused, at the option of the power in question, without entailing any obligation on the part of such power to submit the dispute. Such a provision would, as Professor Nys properly says, do away with the necessity of a special *compromis* between the powers for each case as it arises; would make the proposed court in fact, as well as in form, a court of justice, without, however, as is the case in national courts, compelling the disputant to appear before the court

[1] ERNEST NYS, Development and Formation of International Law, *American Journal of International Law*, vol. 6, pp 308-310.

and to defend the case. The compulsion, if any, would be moral, not legal, and it is believed that the nine nations mutually respecting one another, and having confidence in the motives and devotion of each to the cause of justice, might properly agree to this form of procedure in cases of a justiciable character. The suggestion is, however, not insisted upon, but only mentioned as showing how municipal process may be varied in such a way as to meet international needs, without sacrificing the independence and sovereignty of nations.

Suggestion that proposed court be established without reference to Prize Court

As it appears improbable that the Prize Court will be established in the very near future, the question arises whether it is not possible to take steps for the establishment of the Court of Arbitral Justice for such powers as may be convinced of its advantages, and which may wish to participate in its creation. It has been stated that only one delegation was instructed to propose a permanent court to the Second Peace Conference. It has also been stated that Germany, France, and Great Britain coöperated with the United States, and that it was through this happy coöperation that the draft convention was framed and adopted by the Conference. It is evident therefore that four powers not the least respected in the society of nations have publicly, officially and unequivocally professed their faith in the feasibility of establishing the Court of Arbitral Justice. The same powers agreed, as has also been mentioned, to the establishment of this court for a limited number of powers at a meeting of their representatives at Paris in March, and at The Hague in June, 1910. It is believed that these powers are now, as then, willing to coöperate to this end, and that they would agree to the establishment of the court for a limited number of nations, provided a method of constituting it should be proposed, which would grant them the same representation in it which they would have had under the method of composition employed in the Prize Court.

Public opinion not ripe for court in 1907.

One reason why the Arbitral Court was not established at the Second Peace Conference was that the idea of a permanent court composed of professional judges, selected in advance, and ready for the trial of any and every case that might be submitted was, as far as the nations were concerned, a new project, which they had not heretofore considered; and the failure to constitute the Prize Court since the Conference suggests that public opinion was not then ripe for the proposal. Since the adjournment of the Conference, however, great attention has been given to the proposal to establish a truly permanent court. The most enlightened publicists of many nations have declared themselves in favor of the court, and it may be said that public opinion is not merely in favor of it, and would recommend

Public opinion now in favor of proposed court

its creation, but that a positive and aggressive sentiment exists in more than one country for its establishment.

Instead of enumerating leaders of thought in different countries who have declared themselves in favor of establishing the Court of Arbitral Justice, it will perhaps suffice to mention the significant fact that the Institute of International Law, composed of distinguished publicists, drawn from the four quarters of the globe, has considered the question of the Court of Arbitral Justice in its various aspects, and that the Institute, as a body, in a public session, held at Christiania in 1912, after debate and discussion, unanimously adopted, upon motion of Professor Lammasch, the following resolution:

> While recognizing the great value of the Court of Arbitration, instituted by the Peace Conference in 1899, to international justice and the maintenance of peace;
>
> The Institute of International Law:
>
> In order to facilitate and to hasten recourse to arbitration; to assure the settlement of differences of a legal nature by arbiters representing the different systems of legislation and of jurisprudence;
>
> In order to reinforce the authority of the tribunals in the eyes of the representatives of the parties in controversy by having the members of the tribunal known to them in advance, and likewise to increase the moral force of the decision by having it rendered by a larger number and by the authority of arbiters recognized by the totality of the states;
>
> In order to resolve, in case of a treaty of compulsory arbitration containing a clause to this effect, the doubts which might arise as to whether or not a particular controversy belongs to the category of questions subject to compulsory arbitration under the treaty;
>
> In order to create a court of appeals for decisions rendered by tribunals constituted otherwise than in conformity with the rules of the Hague Convention, in case the special *compromis* should provide for the possibility of such a revision;
>
> Considers it highly desirable that satisfaction be given to the first *vœu* adopted by the Second Peace Conference in favor of the establishment of a Court of Arbitral Justice.[1]

[1] Tout en reconnaissant les grands mérites de la Cour d'arbitrage instituée par la Conférence de La Haye de 1899 pour la justice internationale et le maintien de la paix;

L'Institut de Droit international:

Dans le but de faciliter et de hâter l'accès à l'arbitrage; d'assurer le règlement des différents d'une nature juridique par des arbitres représentant les différents systèmes de législation et de procédure;

Dans le but de renforcer l'autorité des tribunaux vis-à-vis des représentants des parties en litige, par le fait que les membres des tribunaux leur soient connus d'avance, et d'accroître de même la force morale de la sentence rendue

Views of Netherland Minister to the United States in 1910.

The accomplished Netherland Minister to the United States, Mr. Loudon, in a public address delivered before the American Society for Judicial Settlement of International Disputes, held in Washington in 1910, referred "to the great American proposal to establish a regular Court of Arbitral Justice, not supplanting the existing so-called Permanent Court of Arbitration, but offering in addition thereto almost all the advantages of a supreme court with its full judicial equipment." [1] And he ventured the prophecy that when the Third Peace Conference met at The Hague, it would, in all probability, find definitely established "that greatest achievement of all, a permanent Court of Arbitral Justice." [2]

Formation of court before Third Hague Peace Conference depends on action of Netherland Minister of Foreign Affairs

Will the Third Peace Conference find the Court of Arbitral Justice installed in the Peace Palace at The Hague when it meets in the course of the next few years? This is, in the opinion of the undersigned, largely a question for the present enlightened Minister of Foreign Affairs of the Netherlands to decide; and if he takes the initiative, as it is believed he properly can, and which the undersigned is convinced that he is willing to do, the Minister of the Netherlands to the United States will, as Minister of Foreign Affairs of the Netherlands, set in motion the machinery, through diplomatic channels, as provided by the Second Peace Conference, for the establishment of the Court of Arbitral Justice. It may be taken for granted that, for the present at least, it is unwise to attempt to establish the Court of Arbitral Justice by all the nations, forty-four in number, represented at the Second Conference. But the proposers of the court believed that it could properly be established by a lesser number, and the representatives of the four powers entered into a formal agreement for the establishment of the court by a limited number, and their action was subsequently confirmed by their respective governments.

par le nombre plus grand et par l'autorité des arbitres reconnus par la totalité des Etats;

Dans le but de faire trancher, dans le cas d'un traité d'arbitrage obligatoire contenant une clause à cet effet, les doutes pouvant s'élever sur le point de savoir si un différend déterminé rentre dans la catégorie de ceux qui sont soumis par ce traité à l'arbitrage obligatoire;

Dans le but de créer un tribunal de revision des sentences des tribunaux institués en dehors des dispositions de la convention de La Haye, pour le cas où le compromis spécial viendrait à prévoir la possibilité de cette revision;

Estime hautement désirable que satisfaction soit donnée au vœu n° 1 émis par la deuxième Conférence de la Paix en faveur de l'établissement d'une Cour de Justice arbitrale. *Annuaire de l'Institut de droit international,* 1912, pp. 603-604.

[1] *Proceedings of the American Society for Judicial Settlement of International Disputes,* 1910, p. 193.

[2] *Ibid.,* p. 194.

In addition thereto, Austria-Hungary, Italy, and Japan expressed their willingness, in their replies to Secretary Knox's circular note, to coöperate in the establishment of a Court of Arbitral Justice as a separate institution, according to the method of appointing the judges for the Prize Court.

Austria-Hungary, Italy and Japan apparently willing to coöperate.

It is believed that these powers are still willing to coöperate, and we thus have seven nations which have committed themselves, not merely in favor of the court, but in favor of its establishment, provided they were assured representation in it at least equal to that which they would have in the Prize Court. The agreement reached in Paris and The Hague by the representatives of the four governments, was officially communicated to the Minister of Foreign Affairs of the Netherlands, with the request that upon the formation of the Prize Court, he should at the request of the United States address a note, in which the three powers would join, to the signatories of the Prize Court, requesting them to coöperate in the establishment of the Court of Arbitral Justice. The Netherland Minister of Foreign Affairs approved the action of the four powers, and stated his willingness to address the signatories upon the request of the United States. It appears, therefore, that eight powers approve the proposal to create a Court of Arbitral Justice.

Probable attitude of Russia.

It should be borne in mind, however, that the ninth power, Russia, voted for the establishment of the court through diplomatic channels, and the official record of the Conference shows the very great and deep interest which the first Russian delegate—not to speak of Mr. de Martens—took in the project; and in the final result the unfailing intervention of this first delegate, Mr. Nelidow, who was also president of the Conference, counted for much. Russia was then, and appears to be still unwilling to establish the Prize Court, probably because it felt that an attempt would be made to submit to the Prize Court when established the Russian decision of prize cases arising out of the Russo-Japanese war. If this be so, Russia would probably object to any proposition investing the Prize Court with the functions of the Court of Arbitral Justice, because such action would be and is dependent upon the establishment of the Prize Court to which Russia has not agreed. But it does not follow that Russia would refuse to participate in the creation of the Court of Arbitral Justice as a separate institution, if its representation in it were that of the other powers which have already agreed. That is to say, it seems possible that each of the eight powers which were to be permanently represented by a judge of their own choice in the Prize Court, would be willing to

agree to the establishment of the Court of Arbitral Justice if each were to have a judge of its own choice in this institution; and, if Holland, as the host of the court, be added, there would be nine countries willing to establish the court for the decision of such questions as they might care to submit to it. The court itself would thus be composed of nine judges, just as the Supreme Court of the United States is composed of nine judges.

As there may be some objection to constituting the Court of Arbitral Justice, which was only a recommendation of the Conference, before the Prize Court which was a solemn convention, and as there may perhaps be some hesitation in establishing the proposed court by a limited number of powers, and, finally, as there may be a feeling that its creation before the Third Peace Conference might somehow prejudice the institution of a larger tribunal by the Conference, the undersigned submits some general observations on these questions.

Reasons for and against formation of proposed court for limited number of nations.

The Court of Arbitral Justice was subordinated to the creation of the Prize Court, in order that the establishment of the latter court should not be injuriously affected by negotiations for the institution of the Court of Arbitral Justice. Another reason was that, inasmuch as the four powers agreed to recommend to the nations at large the composition of the Court of Arbitral Justice according to the method adopted by Article 15 of the Prize Court Convention, it was highly desirable to postpone the negotiations relating to the Arbitral Court until the Prize Court had been instituted, in order to utilize the method of an existing court. As, however, the Prize Court Convention had not been ratified, and inasmuch as it can not be predicted when the Prize Court Convention will be approved by the number of powers required to put it into effect, it would appear that the reason for the delay has ceased to exist. *Cessante ratione legis cessat et ipsa lex.*

In the judgment of the undersigned these circumstances raise a presumption amounting to a conviction that the time has come to consider (1) whether the Governments of Germany, the United States, France and Great Britain, parties, as has been seen, to the draft conventions of March and July, 1910, to establish the Arbitral Court for a limited number of powers, and (2), whether the Governments of Austria-Hungary, Italy, Japan and Russia, with Holland as the host of the court, would be willing to compose it for themselves, on the distinct understanding that the court, when constituted, would be temporary in its nature, in the sense that the establishment of a larger and more general tribunal should be considered at the next

Peace Conference at The Hague, and that no attempt should be made to persuade those powers which may be opposed to its institution to participate in its creation or operation. Supposing that the powers entitled to a judge under Article 15 of the Prize Court Convention should desire or be willing to constitute the Arbitral Court, it does not seem reasonable that the powers that do not wish to coöperate in its establishment should prevent the powers really desiring it from calling it into being. Respect for the powers that oppose the establishment of the court by means of Article 15 of the Prize Court Convention, can not reasonably mean that the powers desiring to form the Court of Arbitral Justice for themselves are not at liberty to negotiate an agreement for this purpose. The only circumstance which it is conceived should militate against the creation of the court by the nine powers is that its institution might tend to prevent the establishment of a more general court, and thus retard the cause of judicial settlement. But it is difficult to see how the creation of the court by a limited number of powers, to be used by them for the determination of international conflicts of a legal nature, would retard the formation of a larger and more general tribunal, especially if it were understood and clearly expressed in the agreement that the proposed court is established because of the present difficulty in constituting a larger and a more general one, and that the powers undertaking its creation state, at the time of its institution, their willingness to coöperate in the formation of the larger tribunal, either through subsequent diplomatic negotiations or at the Third Peace Conference.

It is assuredly inherent in sovereignty that any number of powers may agree to establish a tribunal for themselves, unless they have expressly renounced the right to do so, and a renunciation of this right is not known to exist.

The Convention for the establishment of a Court of Arbitral Justice adopted at The Hague did not specify, as has been stated, any number of powers as necessary to its creation; and the recommendation to the powers adopted by the Conference to establish the court through diplomatic channels, makes no mention of the number of powers which might be requisite. In this respect the draft convention differed from that of the Prize Court which states in Article 52 that:

> The deposit of the ratifications shall take place . . . if the powers which are ready to ratify furnish nine judges and nine substitute judges to the court, qualified to validly constitute the

court. If not, the deposit shall be postponed until this condition is fulfilled.[1]

That this interpretation is correct is evident from Article 54, which declares that "the present convention shall come into force six months from the deposit of the ratifications contemplated in Article 52."[2]

It should further be stated that it was contemplated that a sufficient number of powers might not ratify the convention to furnish the fifteen judges of which it was to consist, as Article 56 provides that "when the total number of judges is less than eleven, seven judges form the quorum."[3]

There is, however, another reason for believing that the coöperation of no definite number of powers is necessary to the establishment of the Arbitral Court, because the text of the draft convention as finally adopted is silent on this question. The number of judges of which it is to be composed is not specified, and, as previously stated, the recommendation adopted by the Conference for the constitution of the court through diplomatic channels does not make its institution depend upon the coöperation of any definite number. Its establishment is conditioned solely upon an agreement as to the choice of the judges and the constitution of the court. It would seem to be clear, therefore, that any number of powers can agree upon the choice of judges and the constitution of the court, in so far as they are concerned, and that when this is done, the court is established for them without violating either the letter or spirit of the draft convention or recommendation. Its establishment, therefore, would seem to depend upon the willingness of a certain number of powers to constitute it.

Present proposition

The present proposition therefore is, that the Netherland Minister of Foreign Affairs sound the eight powers which have been referred to as probably willing to create the Court of Arbitral Justice, in which court each of the powers, including Holland, would be represented by a judge of its own choice.

Reasons for and against representation of litigating nations in proposed court.

It may perhaps seem strange that the undersigned, who has always been opposed to the participation of judges of the litigating nations in the decision of a controversy, should propose that the Court of

[1] Le dépôt des ratifications aura lieu . . . si les Puissances prêtes à ratifier peuvent fournir à la Cour neuf juges et neuf juges suppléants aptes à siéger effectivement. Dans le cas contraire, le dépôt sera ajourné jusqu'au moment où cette condition sera remplie.

[2] La présente Convention entrera en vigueur six mois à partir du dépôt des ratifications prévu par l'article 52.

[3] Quand le nombre total de juges est inférieur à onze, sept juges constituent le quorum nécessaire.

Arbitral Justice be composed of judges appointed by each of the nations taking part in its establishment. There are, however, several reasons which lead him to favor in practice what is to be rejected in theory. The experience of mixed commissions and in a lesser degree of special tribunals, has been that the decision practically turns upon the vote of the umpire, and that the judges of the parties act as advocates seeking to win the umpire to their point of view. This would be dangerous in a commission of three in which each litigant was represented by a national or in a commission or tribunal of five in which only the umpire was a disinterested person. Where, however, the strangers to the suit, not the nationals of the parties, form the majority of the court, the danger is not so great, although it is still present. The larger the court, the less the danger; and it is believed that it would be reduced to the minimum in the proposed court of nine judges.

But there is another reason of a practical nature which, although he does not share it, nevertheless appeals strongly to the undersigned, namely, that nations seem honestly to believe that in the present state of international development, a national should take part in a case affecting his country, so as to be sure that the attitude of his country and the argument of counsel be carefully weighed and considered by the court; and that the presence of nationals on the bench not only secures this, but prevents the use of language which might wound the *amour propre* of one or the other of the litigating nations. If it be true, for this or for any other honorable reason, that prospective litigants would have greater confidence in a tribunal in which they are represented, it would be unwise even to suggest that they be excluded from the court. Anything that renders the court attractive, anything that encourages the resort to it and facilitates its use, should be accepted, provided it be not inconsistent with the fundamental reason for its creation, namely, the administration of justice.

It is, however, possible to suggest a compromise between these extreme views, if one be thought desirable, by the adoption of the principle laid down in Article 18 of the Prize Court Convention which provides that "the belligerent captor is entitled to appoint a naval officer of high rank to sit as assessor, but with no voice in the decision." [1]

That is to say, the national judge might assist in an advisory capacity in suits concerning his country, without, however, taking

[1] Le belligérant capteur a le droit de désigner un officier de marine d'un grade élevé qui siégera en qualité d'assesseur avec voix consultative.

part in the decision. This method would have the advantages of personal representation without its disadvantages, because the nationals would not only abstain from voting, but might withdraw from the council chamber, if this were thought advisable, so as not to embarrass the other judges by their presence at the moment of reaching a decision.

The nationals might be consulted in the formulation of the decision and be of service in rendering its terms less distasteful to their countries. But this is a matter to be decided by the contracting parties, and experience in this as in other details will doubtless suggest the proper solution of the problem. It may, however, be stated positively that if one nation is represented in a case concerning it, the other must be, whether it be a contracting or a non-contracting party; for equality of treatment, in fact as well as in theory, is an essential of international law.

Holland as seat of court should take initiative for its establishment.

It is believed that such a court could be established if some one power would take the initiative. It would seem that Holland, as the host of the court, should express in the first instance its willingness to have the court established in its territory, because if created, it is not merely to sit on Netherland soil, but to be installed in the Peace Palace side by side with the so-called Permanent Court of Arbitration.

Recommendations of Conference should be carried out before meeting of its successor.

There is, however, a reason which leads the undersigned to believe that the Netherland Minister of Foreign Affairs is not merely justified in taking the initiative for the establishment of the Court of Arbitral Justice, but that it is his duty to do so. It is essential to the success of the Conferences that the recommendations of one Conference be carried into effect before the meeting of its successor. The Second Conference recommended that the Court of Arbitral Justice be established through diplomatic channels. It did not suggest that its consideration be dropped upon the adjournment of the Conference, and that its establishment figure in the program of the Third Conference, which it recommended should be held, approximately, in the year 1915. It would seem admittedly proper that the United States, as the proposer of the Court of Arbitral Justice at the Second Conference, should take the initiative, but the approval of the Conference gives the proposal an international standing which it did not formerly possess; and any action taken by the Netherland Government to put into effect the recommendations of the Conference would be justified by the fact that the Netherlands is the host of the Conference, and thus has a very special interest in its success and in the ratification of its projects.

It will be recalled that the Netherland Government took the

initiative in securing the exclusion of Article 10 of the Convention for the adaptation to maritime warfare of the principles of the Geneva Convention of August 22, 1864, and it is within the official knowledge of the present Minister of Foreign Affairs of the Netherlands that his Government took the initiative in securing the acceptance of the additional protocol which modified the provisions of the Prize Court Convention.

Relation of Administrative Council to Permanent Court and proposed court.

The proposal to establish a truly permanent court, namely, the Court of Arbitral Justice, might well be communicated to the nations by the Netherland Minister of Foreign Affairs, because should this court be established, the Administrative Council of which he is president, acts as the agent of the powers, and the International Bureau created by and subject to the Administrative Council, is utilized by the proposed court.

Thus, Article 12 of the draft convention provides that:

> The Administrative Council fulfils with regard to the Court of Arbitral Justice the same functions as to the Permanent Court of Arbitration.[1]

And Article 13 thus defines the relations of the International Bureau of the existing court to the proposed court:

> The International Bureau acts as registry to the Court of Arbitral Justice and must place its officers and staff at the disposal of the court. It has charge of the archives and carries out the administrative work.
>
> The secretary general of the Bureau discharges the functions of registrar.[2]

It would therefore seem that the Netherland Minister of Foreign Affairs is, by virtue of his presidency of the Administrative Council, not merely interested in the establishment of the court, but that he might well consider it incumbent upon him to take the necessary steps to secure its establishment, by reason of the close and intimate relations existing between the two offices which he has the honor to hold.

There is another reason which suggests the initiative of the Netherland Minister of Foreign Affairs, namely, the fact that his distinguished

[1] Le Conseil administratif remplit à l'égard de la Cour de Justice arbitrale les fonctions qu'il remplit à l'égard de la Cour permanente d'arbitrage.

[2] Le Bureau international sert de greffe à la Cour de Justice arbitrale et doit mettre ses locaux et son organisation à la disposition de la Cour. Il a la garde des archives et la gestion des affaires administratives

Le Secrétaire Général du Bureau remplit les fonctions de greffier.

predecessor agreed, upon the request of the United States, to sound the nations as to their willingness to create the Court of Arbitral Justice, even although but a limited number should coöperate in its creation. If it be objected that the establishment of the Court of Prize was a condition precedent to this action on the part of Holland, the reply is that the establishment of the Prize Court was necessary, as has been pointed out, because the composition of this court was to be used for the Court of Arbitral Justice, and it seemed the part of wisdom to wait until the Prize Court should come into being before attempting to institute the Court of Arbitral Justice. But the failure of the British Government to ratify the Prize Court Convention, due to the objection of the House of Lords, may prevent for years to come the establishment of the Prize Court, and there seems to be no reason why nations desiring the Court of Arbitral Justice should longer defer the realization of this project, especially when the method proposed does not in any way depend upon the existence of the Prize Court.

Non-contracting nations might be offered use of court and appoint judges *ad hoc*.

Should the nine nations be willing, there is no reason why provision should not be made for non-contracting nations to make use of the Court with the consent of the contracting powers. The convention establishing the court might provide that, with the consent of the non-contracting power or powers, the case could be tried before the court and that the non-contracting power should appoint a judge *ad hoc* for the trial of the controversy. In this way, the court would be established for the nine powers willing to create it; each of these countries would be represented in it by a judge of its own choice to serve during the life of the convention, and each judge so chosen would undoubtedly be a distinguished jurist. The decision of the court would, as has previously been stated, bind not merely the parties litigant, but the nine nations. International law would thus have an organ, not merely for the settlement of disputes, but for the development of international law by judicial decision, and the provision that non-contracting powers might, upon their request, use the court, would place it at the disposal of any and every nation that wished to have an international controversy determined by judges acting under a sense of judicial responsibility.

Court is experiment and should be tried under most favorable circumstances.

A court of nine powers would be an international tribunal, and with the provision for its use by non-contracting powers, it might serve as a universal court. It would not, however, be the court for the nations at large, but it would be a great step toward the realization of such a tribunal. It is perhaps best to proceed carefully and cautiously, and to try an experiment upon a small scale before proposing to try it

upon the largest scale. A court of the nine powers would, it is believed, enable the experiment to be tried under the most favorable circumstances, and experience might suggest the ways and means by which the court might be expanded so as to include other, if not all, nations, or, indeed, the court, if successful, might assume the proportions of a truly international court.

Experience would facilitate establishment of larger court.

It has been said that such a court is an experiment. If the experiment succeeds, either the court would be modified to make it the court of the nations at large, or such a court would be created as the result of experience. If, however, the court should fail, neither the nine nations nor the nations at large would care to create an international tribunal. It seems, therefore, the part of wisdom, not merely to try the experiment under the most favorable conditions, but to determine whether a large international court is a *desideratum* of the society of nations; and the undersigned believes that the court should be established for the nine nations because it would render such service to them as to justify its creation, and because its establishment and successful operation would inevitably result in that international tribunal which is essential to the development of international law, by judicial process, and to the peaceful settlement of international disputes of a legal nature. For these various reasons, the undersigned deems it possible to create the Court of Arbitral Justice for a limited number of powers, and he respectfully urges the Netherland Minister of Foreign Affairs to consider the possibility of establishing such a court and to take the initiative for its establishment by proposing to the eight powers above specified its institution through diplomatic channels.

Reasons why present moment is propitious for establishment of court

There are two reasons which make the initiative of the Netherland Minister of Foreign Affairs seem peculiarly propitious at this time.

Europe has been in the past few years on the verge of war, and the thoughts of statesmen have been diverted from peaceful into warlike channels. It appears probable that the powers might welcome an opportunity to create a tribunal for the decision of legal controversies which may arise among them, and thus to show by a concrete example their devotion to peace other than armed peace and the means through which it may be maintained. The proposed court would, to use the happy phrase of Mr. Root, tend "to make the practice of civilized nations conform to their peaceful professions." In the next place, the creation of the court for a limited number of powers at the present time would make it a certainty that the question of establishing the court for all members of the society of nations would be included in the program of the Third Conference, and that the various govern-

ments would study the problem in advance of the meeting to see if it could be solved at that Conference.

There is, however, another reason which makes the initiative of the Netherland Minister of Foreign Affairs at this moment peculiarly timely; for on the 28th day of August, 1913, the Peace Palace which houses the present so-called Permanent Court of Arbitration was formally opened. An Academy of International Law is shortly to be installed in the Palace, which at present is little more than a shell. Would not the powers specified be willing to enter into negotiations at the request of the Netherland Government so that at the formal opening of the Academy, which it is hoped will take place in the month of August of the present year, the Netherland Minister of Foreign Affairs might be able to announce that the nine powers in question had agreed upon the constitution and installation of the Court of Arbitral Justice in the Peace Palace, thus converting it into a Palace of Justice?

It may be that the enthusiasm of the moment has mastered the sober judgment of the undersigned. But years of reflection have convinced him that the establishment of the court is possible; that it would render even greater services to the nations than the Supreme Court of the United States has rendered to the states of the American Union, and he can not dismiss from his mind the feeling that upon the request of the Netherland Minister of Foreign Affairs, the various powers which have heretofore expressed their willingness to constitute the court, might consent to do so in the course of the next few months. Thus the year of 1914 would be memorable for the establishment of a permanent Academy to discuss and to develop the law of nations, and for the establishment of a truly permanent Court of Justice to interpret and to apply the principles of international law upon which the Academy had set the seal of its approval.

It may be a dream, but it is a beautiful dream, and its realization would make for the good of humanity. The dreams of to-day, we are told, are the realities of the morrow. That it may be so in this case is the daily hope and prayer of the undersigned.

JAMES BROWN SCOTT.

The Hague, *January 12, 1914.*

Appendix No. 1

Draft Convention concluded at Paris in March, 1910, by Representatives of Germany, the United States, France and Great Britain to put into effect the Draft Convention recommended by the Second Peace Conference relating to the Establishment of a Court of Arbitral Justice

His Majesty the German Emperor, King of Prussia, . . .

Considering that the Second Peace Conference, in the Final Act of October 18, 1907, recommended to the signatory Powers the adoption of the draft, appended to said act, of a Convention for the establishment of a Court of Arbitral Justice and the putting it into force as soon as an agreement should be reached on the choice of the judges and the organization of the court;

Being desirous of contributing toward the realization of the recommendation thus expressed;

Deeming that, if it is impossible as yet to reach a general agreement for putting into force the draft thus recommended, it is nevertheless useful to establish a Court of Arbitral Justice which may operate pending subsequent permanent rules;

Being persuaded that such a measure, essentially provisional, does not in any way prejudge any agreement which may be reached later for the permanent organization of the Court of Arbitral Justice, and that such an agreement is particularly likely to be reached at the Third Peace Conference;

Have decided to conclude a convention to insure the putting into force of the aforementioned draft, and have appointed as their plenipotentiaries, to wit:

. . . . . .

Who, after depositing their full powers, found to be in due and proper form, have agreed upon the following provisions:

Article 1

The contracting Powers agree to put into force the draft, appended to the Final Act of the Second Peace Conference, of a Convention

relating to the establishment of a Court of Arbitral Justice, making thereto the necessary additions as stated below. The said draft, thereby made the standing rules binding the contracting parties, is appended to the present Convention and forms an integral part thereof.[1]

ARTICLE 2

The Court of Arbitral Justice shall be composed of fifteen judges, nine constituting a quorum.

A judge who is absent or prevented from acting shall be superseded by his substitute.

ARTICLE 3

The judges and substitute judges shall be appointed by the contracting Powers.

They shall participate in the operation of the court in the proportion indicated in Article 15 of the Convention of October 18, 1907, for the establishment of an International Prize Court and in the table annexed to said article.

The judges, sitting in turn, take rank in accordance with the date of their assumption of office.

ARTICLE 4

If a contracting Power engaged in controversy has, according to the rota, no judge sitting in the court, it may ask that the judge or substitute judge appointed by it sit with the court in judgment of the case.

ARTICLE 5

The Administrative Council referred to in the rules shall comprise the diplomatic representatives of the contracting Powers accredited to The Hague and the Minister for Foreign Affairs of the Netherlands.

ARTICLE 6

Action may be brought before the Court of Arbitral Justice and its delegation, provided for in Article 6 of the rules, even by non-contracting Powers. In this case, the expenses and fees due especially by reason of the case which concerns them shall be defrayed by them

[1] For the text of the Draft Convention, see *post*, p 100

to the extent determined by the court or its delegation, which shall take into account that one of the litigant parties is a non-contracting Power or that the court is convening especially for the case.

ARTICLE 7

The general expenses of the Court of Arbitral Justice shall be borne by the contracting Powers in the proportion of their participation in the operation of the court, as provided by Article 3 of the present Convention. The designation of substitute judges shall not constitute a basis of contribution.

The Administrative Council shall apply to the Powers in order to obtain the necessary funds for the operation of the court.

ARTICLE 8

The present Convention shall be ratified and the ratification deposited at The Hague as soon as eighteen Powers shall be ready to ratify and can furnish to the court nine judges and nine substitute judges capable of actually sitting.

ARTICLE 9

The Powers designated in Article 3 shall be permitted to sign the present Convention up to the deposit of the ratifications provided by Article 8.

After deposit they shall be permitted at any time simply to adhere to it. A Power desirous of adhering shall make its intention known in writing to the Netherland Government, transmitting to the latter at the same time its declaration of adherence, which shall be filed in the archives of said Government. The latter shall send, through diplomatic channels, a certified copy of the notice and of the declaration of adherence to all the Powers designated in the foregoing paragraph, informing them of the date on which it has received the notice.

ARTICLE 10

In case the present Convention is not in force with respect to all the Powers designated in Article 3, the Administrative Council shall, in accordance with the provisions of this article, draw up a list of judges and substitute judges through whom the contracting Powers participate in the operations of the court. The judges called upon to

sit in turn shall, for the time which is assigned to them, be distributed in such a manner that the court may, as far as possible, hold its sessions each year with an equal number of judges. If the number of substitute judges exceeds the number of judges the number of the latter may be filled out by means of substitute judges designated by lot among those Powers which do not appoint regular judges.

The list thus prepared by the Administrative Council shall be made known to the contracting Powers. It shall be revised when the number of the contracting Powers is modified as a result of adhesions or denunciations.

The change to be made as a result of an adhesion shall take effect only on and after January 1, following the date on which the adhesion takes effect.

When the total number of judges is less than eleven, seven judges shall constitute a quorum.

Appendix No. 2

Draft of a Convention for the putting into force of the Draft Convention relating to the Establishment of a Court of Arbitral Justice, concluded at The Hague, July, 1910

His Majesty the German Emperor, King of Prussia, . . .

Considering that the Second Peace Conference, in the Final Act of October 18, 1907, recommended to the signatory Powers the adoption of the draft, appended to said act, of a Convention for the establishment of a Court of Arbitral Justice and the putting it into force as soon as an agreement should be reached on the choice of the judges and the organization of the court;

Being desirous of contributing toward the realization of the recommendation thus expressed;

Deeming that, if it is impossible as yet to reach a general agreement for putting into force the draft thus recommended, it is nevertheless useful to establish a Court of Arbitral Justice which may operate pending subsequent permanent rules;

Being persuaded that such a measure, essentially provisional, does not in any way prejudge any agreement which may be reached later for the permanent organization of the Court of Arbitral Justice, and

that such an agreement is particularly likely to be reached at the Third Peace Conference;

Have decided to conclude a convention to insure the putting into force of the aforementioned draft, and have appointed as their plenipotentiaries, to wit:

. . . . . .

Who, after depositing their full powers, found to be in due and proper form, have agreed upon the following provisions:

Article 1

The contracting Powers agree to put into force the draft, appended to the Final Act of the Second Peace Conference, of a Convention relating to the establishment of a Court of Arbitral Justice, making thereto the necessary additions as stated below. The said draft, thereby made the standing rules binding the contracting parties, is appended to the present Convention and forms an integral part thereof.[1]

Article 2

The Court of Arbitral Justice shall be composed of fifteen judges, nine constituting a quorum.

A judge who is absent or prevented from acting shall be superseded by his substitute.

Article 3

The judges and substitute judges shall be appointed by the contracting Powers.

They shall participate in the operation of the court in the proportion indicated in Article 15 of the Convention of October 16, 1907, for the establishment of an International Prize Court and in the table annexed to said article.

The judges, sitting in turn, take rank in accordance with the date of their assumption of office.

Article 4

If a contracting Power engaged in a controversy has, according to the rota, no judge sitting in the court, it may ask that the judge or substitute judge appointed by it sit with the court in judgment of the case.

[1] For text of the Draft Convention, see *post*, p 100

ARTICLE 5

The Administrative Council referred to in Article 12 of the appended rules shall comprise the diplomatic representatives of the contracting Powers accredited to The Hague and the Minister for Foreign Affairs of the Netherlands.

ARTICLE 6

In derogation of Article 21 of the rules, action may be brought before the Court of Arbitral Justice and its delegation, provided for in Article 6 of the rules, even by non-contracting Powers. In this case, the expenses and fees due especially by reason of the case which concerns them shall be defrayed by them to the extent determined by the court or its delegation, which shall take into account that one of the litigant parties is a non-contracting Power or that the court is convening especially for the case.

ARTICLE 7

Notwithstanding the terms of Article 23 of the rules, the parties may, in every case, claim the right to use their own language.

ARTICLE 8

The general expenses of the Court of Arbitral Justice shall be borne by the contracting Powers in the proportion of their participation in the operation of the court, as provided by Article 3 of the present Convention. The designation of substitute judges shall not constitute a basis of contribution.

The Administrative Council shall apply to the Powers in order to obtain the necessary funds for the operation of the court.

ARTICLE 9

The present Convention shall be ratified and the ratification deposited at The Hague as soon as eighteen Powers shall be ready to ratify and can furnish to the court nine judges and nine substitute judges capable of actually sitting.

ARTICLE 10

The Powers designated in Article 3, paragraph 2, shall be permitted to sign the present Convention up to the deposit of the ratifications provided by Article 8.

After deposit they shall be permitted at any time to simply adhere to it. A Power desirous of adhering shall make its intention known in writing to the Netherland Government, transmitting to the latter at the same time its declaration of adherence, which shall be filed in the archives of said Government. The latter shall send, through diplomatic channels, a certified copy of the notice and of the declaration of adherence to all the Powers, designated in the foregoing paragraph, informing them of the date on which it has received the notice.

ARTICLE 11

In case the present Convention is not in force with respect to all the Powers designated in Article 3, paragraph 2, the Administrative Council shall, in accordance with the provisions of this article, draw up a list of judges and substitute judges through whom the contracting Powers participate in the operations of the court. The judges called upon to sit in turn shall, for the time which is assigned to them, be distributed in such a manner that the court may, as far as possible, hold its sessions each year with an equal number of judges. If the number of substitute judges exceeds the number of judges the number of the latter may be filled out by means of substitute judges designated by lot among those Powers who do not appoint regular judges.

The list thus prepared by the Administrative Council shall be made known to the contracting Powers. It shall be revised when the number of the contracting Powers is modified as a result of adhesions or denunciations.

The change to be made as a result of an adhesion shall take effect only on and after January 1, following the date on which the adhesion takes effect.

When the total number of judges is less than eleven, seven judges shall constitute a quorum.

Appendix No. 3

Proposed Draft of a Convention for the Establishment of a Court of Arbitral Justice by and for Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan, the Netherlands and Russia

His Majesty the German Emperor, King of Prussia, . . .

Considering that the second Peace Conference, in the Final Act of October 18, 1907, recommended to the signatory Powers the adoption of the draft, appended to said act, of a Convention for the establishment of a Court of Arbitral Justice and the putting it into force as soon as an agreement should be reached on the choice of the judges and the organization of the court;

Being desirous of contributing toward the realization of the recommendation thus expressed;

Deeming that, if it is impossible as yet to reach a general agreement for putting into force the draft thus recommended, it is nevertheless useful to establish a Court of Arbitral Justice for such Powers as may be willing to coöperate in its establishment and which may operate pending subsequent permanent rules;

Being persuaded that such a measure, essentially provisional, does not in any way prejudge any agreement which may be reached later for the permanent organization of the Court of Arbitral Justice, and that such an agreement is particularly likely to be reached at the Third Peace Conference;

Have decided to conclude a convention to insure the putting into force of the aforementioned draft, and have appointed as their plenipotentiaries, to wit:

. . . . . .

Who, after depositing their full powers, found to be in due and proper form, have agreed upon the following provisions:

Article 1

The contracting Powers agree to put into force the draft, appended to the Final Act of the Second Peace Conference, of a Convention relating to the establishment of a Court of Arbitral Justice, making thereto the necessary additions as stated below. The said draft, thereby

made the standing rules binding the contracting parties, is appended to the present Convention and forms an integral part thereof.[1]

ARTICLE 2

The Court of Arbitral Justice shall be composed of nine judges, five constituting a quorum.

ARTICLE 3

Each contracting Power shall appoint a judge to serve during the life of the Convention. The judges thus appointed take rank in accordance with the date of their assumption of office.

ARTICLE 4

The Administrative Council referred to in Article 12 of the appended rules shall comprise the diplomatic representatives of the contracting Powers accredited to The Hague and the Minister for Foreign Affairs of the Netherlands.

ARTICLE 5

In derogation of Article 21 of the rules, action may be brought before the Court of Arbitral Justice and its delegation provided for in Article 6 of the rules, even by non-contracting Powers.

If the controversy submitted to the Court of Arbitral Justice or its delegation be between a contracting and a non-contracting Power, the latter shall have the right to appoint a judge to take part in the trial and determination of the case. If the Powers in controversy be non-contracting Powers, each one thereof shall have the right to appoint a judge to take part in the trial and determination of the case.

In such cases the remuneration of the judges appointed by the non-contracting Power or Powers shall be paid by the appointing Power, and the expenses and fees caused by the trial and determination of the case submitted by a non-contracting Power or Powers shall be defrayed by the non-contracting Power or Powers to the extent determined by the court or its delegation, which shall take into account that one or both of the litigating parties is a non-contracting Power, or that the court is convened especially for the case.

[1] See *post*, p 100

ARTICLE 6

Notwithstanding the terms of Article 23 of the rules, the parties may, in every case, claim the right to use their own language.

ARTICLE 7

The general expenses of the Court of Arbitral Justice shall be equally borne by the contracting Powers.

The Administrative Council shall apply to the contracting Powers in order to obtain the necessary funds for the operation of the court.

ARTICLE 8

The present Convention shall be ratified and the ratification deposited at The Hague as soon as seven Powers shall be ready to ratify and can furnish to the court five judges.

[ANNEX]

Draft Convention Relative to the Creation of a Court of Arbitral Justice[1]

PART I.—Constitution of the Judicial Arbitration Court

ARTICLE 1

With a view to promoting the cause of arbitration, the contracting Powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Court of Arbitral Justice, of free and easy access, composed of judges representing the various juridical systems of the world, and capable of insuring continuity in arbitral jurisprudence.

ARTICLE 2

The Court of Arbitral Justice is composed of judges and deputy judges chosen from persons of the highest moral reputation, and all

[1] Draft Convention referred to in Articles 1 of the three preceding Draft Conventions, *ante*, pp 91, 94 and 98

fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts, or be jurists of recognized competence in matters of international law.

The judges and deputy judges of the Court are appointed, as far as possible, from the members of the Permanent Court of Arbitration. The appointment shall be made within the six months following the ratification of the present Convention.

Article 3

The judges and deputy judges are appointed for a period of twelve years, counting from the date on which the appointment is notified to the Administrative Council created by the Convention for the pacific settlement of international disputes. Their appointments can be renewed.

Should a judge or deputy judge die or retire, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a fresh period of twelve years.

Article 4

The judges of the Court of Arbitral Justice are equal and rank according to the date on which their appointment was notified. The judge who is senior in point of age takes precedence when the date of notification is the same.

The deputy judges are assimilated, in the exercise of their functions, with the judges. They rank, however, below the latter.

Article 5

The judges enjoy diplomatic privileges and immunities in the exercise of their functions, outside their own country.

Before taking their seat, the judges and deputy judges must, before the Administrative Council, swear or make a solemn affirmation to exercise their functions impartially and conscientiously.

Article 6

The Court annually nominates three judges to form a special delegation and three more to replace them should the necessity arise. They may be reëlected. They are balloted for. The persons who secure the

largest number of votes are considered elected. The delegation itself elects its president, who, in default of a majority, is appointed by lot.

A member of the delegation can not exercise his duties when the Power which appointed him, or of which he is a national, is one of the parties.

The members of the delegation are to conclude all matters submitted to them, even if the period for which they have been appointed judges has expired.

Article 7

A judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a national tribunal, of a tribunal of arbitration, or of a commission of inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A judge can not act as agent or advocate before the Court of Arbitral Justice or the Permanent Court of Arbitration, before a special tribunal of arbitration or a commission of inquiry, nor act for one of the parties in any capacity whatsoever so long as his appointment lasts.

Article 8

The Court elects its president and vice-president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority and, in case the votes are even, by lot.

Article 9

The judges of the Court of Arbitral Justice receive an annual salary of 6,000 Netherland florins. This salary is paid at the end of each half-year, reckoned from the date on which the Court meets for the first time.

In the exercise of their duties during the sessions or in the special cases covered by the present Convention, they receive the sum of 100 florins *per diem*. They are further entitled to receive a traveling allowance fixed in accordance with regulations existing in their own country. The provisions of the present paragraph are applicable also to a deputy judge when acting for a judge.

These emoluments are included in the general expenses of the Court dealt with in Article 31, and are paid through the International

Bureau created by the Convention for the pacific settlement of international disputes.

ARTICLE 10

The judges may not accept from their own Government or from that of any other Power any remuneration for services connected with their duties in their capacity of members of the Court.

ARTICLE 11

The seat of the Court of Arbitral Justice is at The Hague, and can not be transferred, unless absolutely obliged by circumstances, elsewhere.

The delegation may choose, with the assent of the parties concerned, another site for its meeetings, if special circumstances render such a step necessary.

ARTICLE 12

The Administrative Council fulfils with regard to the Court of Arbitral Justice the same functions as to the Permanent Court of Arbitration.

ARTICLE 13

The International Bureau acts as registry to the Court of Arbitral Justice, and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The secretary general of the Bureau discharges the functions of registrar.

The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the Court.

ARTICLE 14

The Court meets in session once a year. The session opens the third Wednesday in June and lasts until all the business on the agenda has been transacted.

The Court does not meet in session if the delegation considers that such meeting is unnecessary. However, when a Power is party in a case actually pending before the Court, the pleadings in

municated through the Netherland Government to the contracting Powers, which will consider together as to the measures to be taken.

Part III.—Final Provisions

Article 34

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

A *procès-verbal* of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the signatory Powers.

Article 35

The Convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for periods of twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

The denunciation shall only have effect in regard to the notifying Power. The Convention shall continue in force as far as the other Powers are concerned.